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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM W. EVANS,

Petitioner,

v.

UNITED ARAB SHIPPING COMPANY S.A.G.; M/V AL WATTYAH, her engines, boilers, etc., in rem,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in its reversal of the district court, which found that the petitioner, a state-licensed vessel pilot, had the requisite "employment related connection" to the vessel being piloted to be entitled to the protection of the Jones Act, 46 U.S.C. app. § 688(a)?

2. What is the nature and scope of the "employment related connection to a vessel in navigation" that is required in order to invoke the Jones Act?

3. If maritime workers on U.S. navigable waters are to be placed into one of only two categories, *i.e.*, Jones Act seamen or longshore/harbor workers, into which category should the pilot, the "quintessential seaman", be placed?

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THE OPINIONS BELOW

The opinion of a panel of the U.S. Court of Appeals for the Third Circuit in *Evans v. United Arab Shipping Company S.A.G. and M/V Al Wattyah* is reported at 4 F.3d 207 (3d Cir. 1993) and appears in the Appendix beginning at A-1. The dissenting opinion of Judge Nygaard begins at A-23. The Findings of Fact and Conclusions of Law issued by Judge Stanley S. Brotman

of the U.S. District Court for the District of New Jersey on July 30, 1991, are reported at 767 F.Supp. 1284 (D.N.J. 1991) and appear in the Appendix beginning at A-30.[1]

JURISDICTION

The decision and judgment of the U.S. Court of Appeals for the Third Circuit was rendered on August 13, 1993. The court of appeals denied petitioner's application for rehearing by its Order entered September 22, 1993. (A-53). The jurisdiction of the Supreme Court to review the judgment of the court of appeals is conferred upon the Court by 28 U.S.C. § 1254.

STATUTES INVOLVED

46 U.S.C. app. § 688(a)
33 U.S.C. §§ 902, 905
Delaware Code Ann. tit. 23, § 121 (1987)

STATEMENT OF THE CASE

Petitioner William W. Evans, a vessel pilot licensed by the State of Delaware and the U.S. Coast Guard, brought this action in the United States District Court for the District of New Jersey pursuant to the general maritime law and the Jones Act, 46 U.S.C. app. § 688(a). The jurisdiction of the district court was founded on 28 U.S.C. § 1333 and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330. Petitioner sought recovery for personal injuries sustained as a result of the negligence of the defendant, United Arab Shipping Company, as well as of the unseaworthiness of defendant's vessel. The district court held that petitioner was covered by the Jones Act, concluding that a river pilot was a "seaman" and that the petitioner had a sufficient

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1. A related opinion of the district court, not ruled upon by the court of appeals and not a subject of this petition, is reported at 790 F. Supp. 516 (D.N.J. 1992).

employment-related connection to the subject vessel at the time of his injury. (A-43).[2]

The district court found as a fact that the negligence of the defendant proximately caused an aggravation of petitioner's preexisting neurological condition. (A-48). However, its finding was specifically premised upon the lightened burden of proof as to causation to which Jones Act plaintiffs are entitled. Pilot Evans appealed the district court's assignment of the burden of proof on the aggravation issue and United Arab Shipping Company cross-appealed the district court's determination that petitioner was entitled to the protections of the Jones Act.

The U.S. Court of Appeals for the Third Circuit reversed the district court's finding that Pilot Evans was entitled to the protection of the Jones Act, which had the effect of avoiding the review of the district court's burden of proof assignment. (A-3). Circuit Judge Nygaard dissented. (A-23).

The court of appeals' opinion and judgment were entered on August 13, 1993. William Evans submitted a petition for rehearing, which was denied by the court of appeals on September 22, 1993. (A-53).

This Petition for a Writ of *Certiorari* followed.

REASONS FOR GRANTING THE WRIT

1. The personal injury remedies of a vital category of seaman, the vessel pilot, have been left in a state of confusion by the split among the circuits.

The petitioner in this case was a state-licensed pilot, serving the ports on the waters of the Delaware Bay and

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2. However, the district court concluded that it was petitioner's burden to prove the extent to which his shipboard accident had aggravated a preexisting neurological condition and ultimately refused to award damages for aggravation of this condition. The issue of the assignment of the burden of proof to the plaintiff was appealed to, but not decided by, the court of appeals. (A-3, 29).

River and its tributaries. He was specially trained and licensed under the laws of the State of Delaware to guide large commercial vessels between the Atlantic Ocean and their destinations. Many of these vessels were fully-laden tank ships which call at the refineries in the Delaware Valley region.

There are more than 1,000 state-licensed pilots in the United States. There are also a significant number of federally-licensed pilots who work exclusively aboard U.S. flag vessels in coastwise commerce. Each of these individuals is specially qualified to navigate a vessel during the most hazardous portion of its journey, while in the confined and congested waters of our ports, bays and rivers. The pilot's job is strictly one of navigation, so in that sense, he or she is the quintessential seaman. As Justice Curtis wrote in *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299 (1852):

> Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies the most important and responsible place among those thus engaged.

53 U.S. at 316.

In *Ex Parte McNeil,* Justice Swayne wrote that pilots were:

> as much a part of the commercial marine as the hull of the ship and the helm by which it is guided . . . Pilots are a meritorious class, and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places and ready to perform the duties of their vocation.

80 U.S. (13 Wall.) 624, 625 (1871).

The question presented in this appeal is whether or not this vital class of mariner is entitled to the remedies provided by the Jones Act, 46 U.S.C. app. § 688(a), as against the owner/operator of the vessel which has employed him. In attempting to fashion an answer to this question, the lower courts, including the Courts of Appeals for the Third, Fourth, Fifth and Ninth Circuits, have left the law in a confused state. It is important that this Court seize the current opportunity to set out a uniform rule defining the personal injury rights and remedies to which the members of this critical class of mariner are entitled. As will be explained below (Reason #2), this case also offers a perfect opportunity to provide guidance and, perhaps, to definitively answer what may be the last remaining general question regarding Jones Act entitlement: the exact nature and scope of the requisite worker/vessel connection.

The courts which have to date been asked to define the pilot's personal injury remedies have steered variant analytical courses. Moreover, in several important respects, these courts have reached different destinations. In the case at bar, for example, the district court relied upon this Court's decision in *McDermott International, Inc. v. Wilander,* 498 U.S. 337 (1991), in finding that, given the essential role played by the pilot in the safe navigation of a vessel and his receipt of remuneration for his services, the petitioner was a "seaman" with a sufficient "employment-related connection" to the defendant's vessel to be entitled to Jones Act remedies.[3]

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3. It was significant to the district court that, according to the *McDermott* decision, a maritime worker who has been excluded from receiving benefits under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-905 *et seq.*) ("LHWCA") as being a "master or member of the crew of a vessel" was, by definition, entitled to Jones Act seaman's status, (A-41), citing *McDermott,* 498 U.S. at 349. And, as the district court pointed out, an early but vital decision of the federal Employee's Compensation Commission had determined that pilots were, indeed, excluded

The Third Circuit Court of Appeals took a different analytical tack in the course of reversing that decision. The Third Circuit acknowledged that under its precedents a person who "performs the core function of a seaman aboard a vessel in navigation", might not need a permanent connection to the vessel. (A-13 n.7). However, the panel majority[4] paradoxically held that:

> "[b]ecause we conclude a compulsory river pilot such as Evans is not an employee of the vessel he pilots, *he would be unable to recover under the Jones Act even if he is a seaman.*"

(A-13) (emphasis added).

Despite the fact that Pilot Evans was hired by the vessel owner, was paid for his navigation services, and was injured in the course of his employment while debarking from the ship, the Third Circuit overturned the district court's finding of a sufficient "employment-related connection". (A-15). Contrary to the specific pronouncement of this Court, the Third Circuit demanded a strict "employer/employee" relationship as defined by common law rules of vicarious liability. (A-15). [5] The Third Circuit noted that under Delaware law the defendant was obliged to receive a pilot citing Del. Code Ann. tit. 23, § 1211. (A-16). The court then cited the decision in *Homer Ramsdell Transportation Co. v. La Compagnie*

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from LHWCA benefits because they were "masters or members of a crew", (A-42), citing *Longshoremen's Act,* Opinion #22, 1928 AMC 263 (U.S. Employee Comp. Comm'n 1927).

4. Circuit Judge Richard L. Nygaard wrote a dissenting opinion. (A-23).

5. This was in direct contravention of the decision in *Cosmopolitan Shipping Co. v. McAllister,* 337 U.S. 783 (1949), which held that "Congress intended that the purposes of [FELA and the Jones Act] should not be restricted by common-law concepts of control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality part of the processes and dependent upon the businesses to which they rendered service." 337 U.S. at 790.

Generale Transatlantique, 182 U.S. 406 (1901), which had held that a shipowner was not liable *in personam* for the negligence of a compulsory pilot because of a lack of discretion in selection of the individual. Applying the *Homer Ramsdell* reasoning, the Third Circuit decided that, although a compulsory pilot may well be a "seaman", injuries occurring to him while aboard ship do not occur "in the course of his employ", in a Jones Act sense.[6]

The Fifth Circuit Court of Appeals has approached the identical issue in an altogether different fashion. Refusing to make an exception due to the nature of the pilot's shipboard work, and without raising any issue pertaining to employer/employee control, the Fifth Circuit in *Bach v. Trident Steamship Co.,* 920 F.2d 322 (5th Cir.), *vacated and remanded*, 499 U.S.___, 111 S. Ct. 2253, *aff'd*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 504 U.S.___, 112 S.Ct. 1996 (1992), held that a pilot does not qualify as a Jones Act seaman because he is not permanently attached to a vessel or a particular fleet of vessels. *Bach,* 920 F.2d at 326. However, as the late Judge John Brown pointed out in dissent, the permanent attachment prong of the Fifth Circuit's Jones Act entitlement test arose to cope with suits brought by persons employed in the offshore oil industry whose job descriptions were not comparable to those of the personnel engaged aboard traditional vessels. *Bach,* 920 F.2d at 333 (Brown, J., dissenting). Thus, the *Bach* case yields

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6. Of course the approach taken by the Third Circuit overlooks the import of this Court's decision in *The CHINA,* 74 U.S. (7 Wall.) 53 (1868), entirely. In that case it was held that the ship *in rem* is vicariously liable for the acts of its compulsory pilot. The state statute at issue and the amount of actual control exercisable by the master over the pilot was in all relevant respects identical to those factors present in *Homer Ramsdell,* but the Court focused upon the relationship of the pilot to the ship. Of course, Jones Act rights depend, according to the *McDermott* case, only upon the existence of a "connection to a *vessel* in navigation." 499 U.S. at 355. Emphasis added.

the anomalous result that the most important navigator aboard the vessel is not given the same personal injury remedies as the lowest-rated deck hand or dishwasher. This result is based upon the rather unsatisfying "permanency or substantial work" test which apparently requires some minimum term of employment.

The personal injury remedies left available to a pilot in the Fifth Circuit are not altogether clear. The plaintiff in *Bach* had, for example, asserted a claim in terms of the general maritime law warranty of seaworthiness, which claim cannot be asserted by workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905. (A-60). The Fifth Circuit recognizes that maritime workers on the navigable waters of the United States ought to be covered by either the LHWCA or the Jones Act. See *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 n.2 (5th Cir. 1980) ("seaman" and "member of crew" are interchangeable terms). However, the *Bach* court was plainly perplexed by the situation presented by the compulsory pilot: "The LHWCA covers those 'engaged in maritime employment'. 33 U.S.C. §§ 902(3), 903. The record does not clearly show that Bach was the employee of anyone. It is, therefore, unclear whether the LHWCA covered him." 920 F.2d at 327 n.5.

Undaunted by the fact that state-licensed pilots have no employers other than those who own or operate the ships upon which they work, the Fourth Circuit has specifically held that pilots are "maritime workers" covered by the LHWCA. This conclusion led to the determination that pilots are barred by the LHWCA from asserting an action for unseaworthiness against the shipowner. *Harwood v. Partredereit A.F. 15.5.81,* 944 F.2d 1187 (4th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 1265 (1992). Employing a very broad construction of the LHWCA and the amplifying Supreme Court precedent, the Fourth Circuit held that because he was injured upon navigable waters, the pilot, irrespective of the nature of his job duties, must have been

intended by Congress to be limited to compensation benefits under the LHWCA. 944 F. 2d at 1190-91. As pointed out by the dissenting judge, the *Harwood* decision directly contradicts the determination made by the Employee's Compensation Commission in 1927 (see n.3, *supra*) that pilots are not covered by the LHWCA, which decision is to be given pre-eminent authoritative weight per *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1939). 944 F.2d at 1194 (Ervin, C.J., dissenting.) At bottom, the *Harwood* decision fails to properly recognize that pilots are quintessential seamen. Most importantly, because pilots have no other employers but the owner/operator of the vessel being piloted, the LHWCA compensation scheme provides absolutely no benefit for them.

This last point was made by the court in *Clark v. Solomon Navigation Ltd.,* 631 F. Supp. 1275, 1283 (S.D.N.Y. 1986). The *Clark* court arrived at yet another conclusion as to the causes of action available to the pilot. Chief Judge Motley held that the Jones Act was not applicable, the pilot not being "permanently" attached to any particular vessel, but that the pilot was undeniably engaged in seaman-like work. Asserting that the doctrine of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), had retained its vitality *vis-a-vis* those persons not falling within the ambit of the LHWCA, the *Clark* court concluded that river pilots are entitled to the warranty of seaworthiness.

Finally, in *Ringering v. Compania Maritima De-La-Mancha,* 670 F. Supp. 301 (D. Or. 1987), *aff'd mem.,* 848 F.2d 1243 (9th Cir. 1988), the Ninth Circuit Court of Appeals affirmed a district court decision which had squarely held that river pilots were entitled to the protection of both the Jones Act and the warranty of seaworthiness.

In summary, the jurisprudence with respect to the personal injury remedies owing to a pilot is in total chaos. In the Ninth Circuit, pilots enjoy the protection of the Jones Act and the warranty of seaworthiness; in the

Fourth Circuit, they are entitled to neither, but are harbor workers without benefits. In the Second Circuit, pilots do not receive Jones Act protection but they are entitled to the warranty of seaworthiness. In the Fifth Circuit a pilot is not a "seaman", is therefore not entitled to recover under the Jones Act, may or may not be a harbor worker and may or may not have a warranty of seaworthiness. In the Third Circuit a pilot is not entitled to the Jones Act whether he/she qualifies as a "seaman" or not. Depending upon the forum selected, a pilot could be a Jones Act seaman, a *self-employed* LHWCA employee, or a "*Sieracki* seaman."

Although the sheer numbers of pilots in the United States is not great, the importance of this class of mariner to the country's water-borne commerce and of this issue to this class of seaman cannot be overstated. The time and judicial resources expended by this Court toward establishing a uniform rule to cover pilots will be well spent.

2. This case squarely presents the critical issue *vis-a-vis* Jones Act entitlement left undecided in this Court's jurisprudence, to wit, the requisite nature and scope of the "employment-related connection" between the worker and a vessel.

In *McDermott International, Inc. v. Wilander*, *supra*, it was recognized that this Court's prior decisional law pertaining to Jones Act entitlement had "led the lower courts to a 'myriad of standards and lack of uniformity in administering the elements of seaman status' ", creating a legal labyrinth in which the lower courts were lost. 498 U.S. at 353. In *McDermott,* the specific holding was that the plaintiff need not have been directly engaged in the navigation of a vessel in order to qualify as a Jones Act seaman. This made it clear that so long as a claimant had an "employment-related connection to a vessel in navigation", he or she was entitled to the Jones Act remedy. The *McDermott*

decision recognized some residual ambiguity, however. "The key to seaman status", wrote Justice O'Connor on behalf of the unanimous Court, "is employment-related connection to a vessel in navigation. *We are not called upon here to define this connection in all details,* but we hold that a necessary element of the connection is that a seaman perform the work of a vessel." 498 U.S. at 355 (emphasis added).

The case now before the Court, that of a state-licensed pilot's suit against the owner/operator of a vessel engaging his services, cries out for a uniform definition of the "details" of the employment-related connection. The circuit courts are in disagreement as to the nature and length of the employment relationship required for Jones Act "seaman" status.

The petitioner in this case came aboard the vessel for the sole purpose of navigating it in exchange for pay, and had no employer other than the defendant vessel owner. Based upon those facts, the district court found that the requisite "employment-related connection to a vessel" existed. In its decision in *Bach,* the Fifth Circuit required a showing that the claimant had a "permanent attachment to or substantial work on a vessel or identifiable fleet of vessels." 920 F.2d at 324. The *Bach* court refused to make an exception to that test for the worker, such as a pilot, whose work is entirely navigation-oriented. 920 F.2d at 326. However, other courts have held that so long as the claimant was employed aboard a vessel in navigation in furtherance of that vessel's purpose, the length of time of his service is irrelevant. *See, e.g., Weiss v. Central Railroad Co.,* 235 F.2d 309 (2d Cir. 1956).

The late Judge John R. Brown, former Chief Judge of the Fifth Circuit Court of Appeals, wrote a provocative dissent to the decision of the panel in *Bach v. Trident Steamship Co.* He pointed out that the "more or less permanent connection" element of the Jones Act test had crept into the Fifth Circuit's jurisprudence in response to the problems inherent in classification of the

numerous types of job descriptions found in the offshore oil industry. 920 F.2d at 333, (Brown, C. J., dissenting). Judge Brown argued in his *Bach* dissent that the pilot, as the quintessential seaman, was a critical member of the ship's complement, irrespective of the length of time of his employ or the manner in which he was paid.[7]

Although many circuits have incorporated the "more or less permanent attachment" test, others have not. Prior to the instant case, the Third Circuit Court of Appeals had placed a foot in each camp. In its decisions in *Griffith v. Wheeling-Pittsburgh Steel Co.,* 521 F.2d 31 (3d Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976), and *Mach v. Pennsylvania Railroad Co.,* 317 F.2d 761 (3d Cir. 1963), the Third Circuit essentially defines a sliding scale depending upon the nature of the claimant's work.

In *Mach v. Pennsylvania Railroad Co.,* the plaintiff's job was to go aboard coal barges stationed at his employer's pier and, utilizing winches and mooring lines, move the barges along the pier for discharge. The owners of the barges upon which he worked were not identified in the case, but it was clear that the claimant had no definite or permanent connection with any barge or group of barges.[8] The *Mach* court held, nevertheless,

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7. Judge Brown actually wrote two dissenting opinions in *Bach.* In response to a Petition for Writ of Certiorari, the Fifth Circuit was directed to reconsider *Bach* in light of the then-recent *McDermott* decision. 499 U.S. ___, 1991 AMC 2701 (June 3, 1991). Unlike the panel's majority, Judge Brown saw that *McDermott* contained a great deal of language in support of a pilot's Jones Act status. *Bach v. Trident Steamship Co.,* 947 F.2d 1290 (5th Cir. 1991), *cert. denied,* 504 U.S.___, 112 S.Ct. 1996 (1992) (Brown, C.J., dissenting).

8. In *Mach,* the plaintiff was deemed to have a Jones Act remedy against his employer, Pennsylvania Railroad Co., which was the owner of a waterfront terminal. Critical to this determination was the fact that the plaintiff worked aboard vessels docked at the terminal, but it is curious that the court paid absolutely no attention to whether or not plaintiff's employer owned or controlled these vessels.

that the claimant was entitled to sue under the Jones Act, stating that:

> The duration of service for and upon a vessel may determine whether shipboard work which is not normally performed by a ship's company makes the worker a crewman, but lack of long continued attachment to the vessel cannot, as a matter of law, serve to deny seaman's status under the Jones Act to an employee who is injured while assigned to and performing normal crew service.

317 F.2d at 763-64.

In so holding, the court cited the Second Circuit's decision in *Weiss v. Central Railroad,* 235 F.2d 309 (2d Cir. 1956), in which that court had stated that it knew of no instance in which a worker whose job it was to actually steer and navigate a vessel had been denied Jones Act protection merely because the duration of his service was short.

In *Griffith v. Wheeling-Pittsburgh Co., supra*, however, the Third Circuit distinguished *Mach* in a case where the plaintiff, a member of the steel company's labor pool, had been temporarily assigned docktender duties which required him to go aboard barges from time to time. The plaintiff in *Griffith* was never engaged in vessel maneuvering and spent as much or more time working at jobs within the mill as he did alongside the dock.

In the case at bar, the Third Circuit seemed to recognize that its prior decisions had placed it inside a jurisprudential box of sorts. The court realized that a strict application of *Mach* might have required a finding of Jones Act entitlement, but the court avoided the application of *Mach* by examining in some detail the nature of the relationship between a pilot and an employing vessel owner. (A-15). In spite of this Court's admonition in *Cosmopolitan Shipping Co. v. McAllister* that "Congress intended that the purposes of [the Jones Act] should not be restricted by common-law concepts of

control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality part of the processes and dependent upon the businesses to which they rendered service", 337 U.S. at 790, the Third Circuit applied the general rules of agency or vicarious liability to the *Evans* case. (A-15).

Without entering a full discussion of the merits at this juncture, it can be said that although the pilot's relationship to the vessel is somewhat unique, the case at bar presents an important opportunity to define the nature of the requisite "employment-related connection". Is it appropriate, for example, to utilize a common law master/servant test when the issue is the breadth of beneficent legislation as opposed to the limits of vicarious liability to third persons? Of what import is the duration of the connection? Captain Evans was aboard the defendant's vessel for nearly eight hours; it is quite common for shipowners to hire "night mates", temporary officers who are hired out of the local union hall, to stand in-port watches. Why would the pilot, who is arguably more important to the vessel and has less control over his working conditions, be deserving of less protection? Should not the nature of the claimant's shipboard work have a bearing on the question, as the Third Circuit cases suggest?

Given the tack taken by the Third Circuit in the instant case, a number of important questions are brought to the fore pertaining to the identification of the appropriate Jones Act defendant. The presumption among the circuits is that a Jones Act claimant can sue only his "employer" and that he can have only one such "employer".[9] The eminent admiralty law scholars, Pro-

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9. *See, e.g., Haskins v. Point Towing Co.*, 421 F.2d 532, 536 (3d Cir.), *cert. denied*, 400 U.S. 834 (1970), in which the Third Circuit dismissed an action filed by an illiterate tugboat captain who had made a mistake in selecting between two related corporations.

fessors Grant Gilmore and Charles L. Black, Jr., have directly challenged these presumptions. In discussing the identity of the appropriate Jones Act defendant, Gilmore and Black begin as follows:

> In the normal situation the Jones Act defendant is a) the plaintiff's employer, and b) the operator of the ship on which the plaintiff was injured. Suppose, however, that the employer has no control over the operation of the ship (the Jones Act being restricted to injuries caused by operating negligence.) Can the operator be sued under the Jones Act although he is not the plaintiff's employer? Alternatively, can the employer be sued under the Jones Act although he does not operate the ship? And, if the non-operating employer can be sued under the Jones Act, is he liable only for his own negligence or is he liable for the operator's negligence as well? The Jones Act case law does not clearly answer any of these questions.

Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty* § 6-21(a) at 335 (2d ed. 1975).

Gilmore and Black go on to discuss the Second Circuit's decision in *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973), which had grappled with the proposed questions in concluding that a hairdresser, who worked in a ship-board shop operated by her employer, a concessionaire, could not sue the shipowner under the Jones Act. Gilmore and Black then comment:

> There are a great many maritime workers who qualify as "seamen" and who suffer work-related injuries on vessels operated by persons who may not be, technically, their employers. The issues warrant further analysis — in particular, the basic holding in *Mahramas* that Jones Act actions can be brought only against an "employer" and that the plaintiff can have only one employer at a time.

> According to Judge Anderson's *Mahramas* opinion, "there has never been any question that the Jones Act applies only between employees and their employers." That proposition has, indeed, been repeated hundreds, if not thousands, of times in judicial opinions and in the academic literature. On the other hand, nothing about the Jones Act is either true or false until the Supreme Court has held it to be so. *Cosmopolitan Shipping Co. v. McAllister* is regularly cited as having so held.

Gilmore and Black, *supra,* at 336-37.

Cosmopolitan Shipping arose in a wartime context in which ships had been commandeered by the United States government and crewmen had signed papers indicating that the government was to be their "employer". Mr. McAllister apparently desired a jury trial and, therefore, brought his case instead against the ship's former owner, Cosmopolitan. Cosmopolitan retained, as "general agent", a considerable amount of administrative responsibility with regard to the ship's operation. In deciding the case, Justice Reed first noted that the U.S. Government was the plaintiff's technical employer, but nonetheless pursued a lengthy discussion of the responsibilities of Cosmopolitan *vis-a-vis* shipboard operating conditions. According to Gilmore and Black:

> What *McAllister* comes down to is that Cosmopolitan could not be sued under the Jones Act because a) it was not McAllister's employer **and** b) it was not the operator of the ship. *McAllister* (which was a 5-4 decision) tells us nothing about what the Supreme Court majority might have held if it had concluded that Cosmopolitan, although not the employer, was the operator. Thus, Justice Reed's remarks about the employment relationship rank as dictum and his lengthy demonstration of the fact that Cosmopolitan did not operate the ship (but merely "managed a certain shoreside business") suggests that even the

> *McAllister* majority regarded the question as open and unsettled. And if *McAllister* did not hold that the Jones Act defendant must be the plaintiff's one and only employer (which it did not), then no other Supreme Court case comes even close to establishing that proposition.
>
> The Jones Act was designed to remove the bar created by the fourth proposition in *The OSCEOLA* [citation omitted] and to allow seamen to recover damages for work-related injuries caused by shipboard negligence. On policy grounds, there seems to be no good reason for limiting the recovery to actions against "employers"; this is particularly true in light of the fact that the action for unseaworthiness, which has become the identical twin of the Jones Act action, is not so limited. The longstanding assumption that the only possible Jones Act defendant is the plaintiff's one and only employer should be reconsidered. As Judge Oakes' *Mahramas* dissent suggests, there are two ways of going about this reconsideration. One is to conclude that in *Mahramas*-type situations, the plaintiff has two employers: at least for purposes of the Jones Act, there is no reason why a seaman cannot serve two masters. The other is to conclude that Jones Act liability rests essentially on control of the ship's operation and not on the employment relationship – an approach which the *McAllister* case certainly leaves open.

Gilmore and Black, *supra*, at 338-39 (emphasis added; footnotes omitted).

It is time for this Court to address the issues posed by Professors Gilmore and Black in 1975 and presented now in this case.

Aside from the academic authorities, this Court has itself held that a shipowner's liabilities to one who acts as a seaman aboard his vessel arise irrespective of the

existence of any contractual-type employment relationship. In *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), a shipowner was held to be liable to a longshoreman under the doctrine of unseaworthiness. It was there held, endorsing the analytical approach taken in *International Stevedoring Company v. Haverty,* 272 U.S. 50 (1926), that it is not an employer/employee relationship which gives rise to the shipowner's duties, but the control which the shipowner has over the shipboard working environment. The court was discussing the warranty of seaworthiness in *Sieracki,* but the rationale used to reject the arguments of the shipowner was born in the *Haverty* case, which had allowed Jones Act protection to a longshoreman working aboard ship. A strong argument can be made that the precedential effects of *Sieracki* and *Haverty* survive to this day, notwithstanding the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, for those workers who, like Captain Evans, fall outside the scope of the LHWCA.

There has never been any contest of the fact that United Arab, the defendant below, controlled the shipboard conditions to which the petitioner was subjected. Captain Evans was not merely a visitor or business invitee aboard the vessel. He had a definite and important employment-related connection to defendant's vessel. He was a seaman, and as such was entitled to the protection of the Jones Act. He was undoubtedly injured "in the course of his employment aboard the vessel" and is deserving of a recovery against the ship's operator whether or not a common law master/servant relationship existed between them. This Court should issue the requested Writ in order to decide these issues.

CONCLUSION

Left unreviewed, the decision of the United States Court of Appeals for the Third Circuit leaves continuing confusion in the maritime law on the status of pilots. The various circuit courts have held pilots to be harbor workers, to be maritime workers who are neither Jones Act seamen nor harbor workers, to be maritime workers entitled to the protection of the warranty of seaworthiness, or not so entitled, depending on the court. There is neither certainty nor consistency about the nature or the scope of the requisite employment related connection for Jones Act status. The purpose for which the Jones Act was passed, the protection of American seafarers, upon whom the mercantile commerce and the defense of the nation depends, will continue to be frustrated. The Writ of Certiorari should be granted and the decision of the Court of Appeals for the Third Circuit reviewed to effect a resolution of this unsatisfactory situation.

Respectfully submitted,

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Filed August 13, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5300, 92-5301, 92-5534 & 92-5535

WILLIAM W. EVANS,

Appellant at Nos. 92-5300 & 92-5534

v.

UNITED ARAB SHIPPING COMPANY S.A.G.; M/V AL WATTYAH, her engines, boilers, equipment, etc.

UNITED ARAB SHIPPING COMPANY S.A.G.,

Appellant at Nos. 92-5301 & 92-5535

Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil Docket No. 89-05246)

Argued: February 22, 1993

PRESENT: HUTCHINSON, NYGAARD and SEITZ, *Circuit Judges*

(Opinion Filed August 13, 1993)

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

Appellant/Cross-Appellee, William W. Evans ("Evans"), a compulsory river pilot, brought this action in the United States District Court for the District of New Jersey pursuant to general admiralty and maritime law and the Jones Act ("the Act"), 46 U.S.C.A. app. § 688 (West Supp. 1993).[1] He sought recovery for personal injuries allegedly sustained as a result of the negligence of the appellee/cross-appellant, United Arab Shipping Company

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1. Evans did not specifically plead a Jones Act claim in his complaint; however, without objection, the district court recognized it as such based on the theories on which his case was presented throughout the bench trial. *See* typescript *infra* at 11 n.5.

("UASC" or "shipowner"), as well as the unseaworthiness of UASC's vessel. The district court held that Evans was covered by the Jones Act because a compulsory river pilot qualifies as a "seaman"; furthermore, it held that Evans was employed by the vessel at the time of his injury as the Act requires. Because Evans was unable to show the extent to which his accident aggravated a preexisting neurological condition, however, the district court refused to award him any damages for aggravation of this condition.

At our Docket No. 92-5301, UASC cross-appeals the district court's order holding that Evans is a "seaman" entitled to protection under the Jones Act. According to UASC, Evans lacks the requisite employment relationship with the shipowner as well as the permanent attachment to the vessel that it says is required for seaman status under the Act. As a prerequisite to recovery under the Act, a plaintiff must establish that the injury occurred within the scope of employment. Evans did not establish that he was an employee of UASC within the meaning of the Act and was instead an independent contractor. A shipowner does not have the right to control the actions of a compulsory river pilot or the right to hire or fire that pilot under applicable Delaware law. We hold, therefore, that Evans is not entitled to recover against UASC under the Jones Act because he was not an employee of UASC acting within the course of his employment when he was injured. This disposition makes it unnecessary for us to reach the issue of whether a compulsory river pilot must have a permanent attachment to a particular vessel to claim Jones Act protection.[2] Nevertheless, we will affirm the judgment for

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2. UASC also argues, in the alternative, that even if Evans is covered by the Jones Act, he has not met his burden of proving that UASC aggravated his preexisting neurological condition. At our Docket No. 92-5300, Evans alleges that the district court erred in: (1) placing the burden of establishing the amount of damages representing aggravation of his preexisting neurological disease caused by UASC's negligence upon him; and (2) determining that he did not meet this burden and therefore awarding no damages for aggravation of his pre-existing neurological condition. Because of our conclusion on UASC's cross-appeal that Evans cannot maintain a Jones Act action, these issues are also avoided.

Evans, but on different reasoning than that used by the district court.

The district court has already determined that Evans has not established a legal or proximate cause between the shipowner's acts and aggravation of Evans's preexisting neurological disease under traditional causation principles and, instead, based its conclusion on the Jones Act's "featherweight" standard of causation. *Evans v. United Arab Shipping Co.*, 767 F. Supp. 1284, 1293 (D.N.J. 1991) (*Evans I*). The Jones Act's featherweight standard, in common with most workers' compensation statutes, extends common law definitions of legal cause to include precipitation as well as aggravation. Without the Act's recognition of this broader rippling effect, the medical evidence Evans presented is insufficient to show that his accident while descending the ship's ladder aggravated his preexisting, but largely asymptomatic, neurological disease. Absent the Act's extension of traditional views on the limits of legal or proximate cause, we agree with the district court's conclusion that this essential element to recovery for aggravation of Evans's neurological disease is lacking. A remand to the district court for a determination of whether Evans can recover under general admiralty and maritime law for aggravation of his neurological condition, therefore, is likewise unnecessary. USAC has conceded liability for Evans's orthopedic injury. Accordingly, we will affirm the district court's order entering judgment for Evans in the amount of $23,630.00 for the orthopedic injuries he suffered, lost wages and pain and suffering and will do so. *See Evans v. United Arab Shipping Co.*, 790 F. Supp. 516, 520 (D.N.J. 1992) (*Evans II*).

I.

Evans was a compulsory river pilot licensed by the United States Coast Guard and the State of Delaware for over forty years.[3] As a pilot, Evans was hired to steer ships

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3. Pursuant to 46 U.S.C.A. § 8501 (West Supp. 1993, Partial Revision) (delegating to the states the continued regulation of pilotage), Delaware requires all vessels entering the Delaware Bay to take a state licensed

through the Delaware River and Bay and the Chesapeake and Delaware Canal. During all times material to this action, Evans was a member of the Pilot's Association for the Bay and River Delaware ("the Association"). He paid federal income taxes from 1986-89 as a self-employed taxpayer.

UASC is jointly owned by the governments of Saudi Arabia, Kuwait, Iraq, United Arab Emirates, Bahrain and Qatar. It owns and operates the container vessel M/V AL WATTYAH. On the night of September 9-10, 1989, Evans was on call at the Lewes, Delaware pilot station and was called to pilot the M/V AL WATTYAH toward the Chesapeake and Delaware Canal as far as Chesapeake City, Maryland where a Maryland pilot was to take over the helm. A pilot launch took Evans to the ship, which he boarded by a rope ladder with wooden rungs, known as a pilot ladder or "Jacob's ladder." Evans had difficulty in boarding from this ladder because it was in poor condition but climbed aboard the vessel without incident. He then piloted the ship to the Maryland border. As the vessel approached the point where the Maryland pilot was to board, Evans asked the master to rig the starboard side accommodation ladder so that he could disembark without using the poorly maintained Jacob's ladder that had made boarding difficult. The accommodation ladder was a staircase built of galvanized steel or aluminum, attached at its top to the main deck of the vessel, from which it was lowered to within a few feet of the water's surface. At its lower end there was an attached adjustable platform that could be fixed in position parallel to the water.

At trial, the parties did not dispute the circumstances of the accident. The pilot launch arrived at the vessel with the Maryland pilot on board. He stepped from the launch onto the lowest rung of the accommodation ladder without ever

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pilot aboard or be subject to penalties and fines. *See* Del. Code Ann. tit. 23, § 121 (1987). The statute also recognizes that the vessel may have to carry the pilot to sea if he cannot be removed from the vessel at the outer edge of the pilotage ground with safety. *See id.* § 132 (1987) (compelling compensation for pilot carried to sea).

setting foot on the lower platform. A few minutes later, a seaman from the M/V AL WATTYAH started down the accommodation ladder to deliver Evans's briefcase to the launch and to assist Evans in leaving the vessel. As the seaman stepped onto the lower platform, it pivoted and dropped. The seaman fell but suffered no injury. After seeing the seaman examine the platform, Evans inquired whether it was safe to use the accommodation ladder. Evans understood the seaman's response to mean that the ladder was safe and he proceeded to descend. When he reached the lowest rung, he stepped onto the platform. It pivoted on its axle and dropped out from under him. He shifted his weight to the handrail. The handrail collapsed and he fell and struck the deck of the launch with his tailbone. In the fall Evans's face and left rib cage hit the outboard channel of the accommodation ladder. Shaken, Evans succeeded in climbing aboard the launch with the assistance of another seaman. *See Evans I*, 767 F. Supp. at 1285-87.

Evans brought this action against UASC as the shipowner and the M/V AL WATTYAH *in rem*, seeking damages under general admiralty and maritime law for orthopedic and neurological injuries suffered while disembarking from UASC's vessel. Evans pleaded a negligence and unseaworthiness theory against UASC and the vessel. He did not specifically plead a Jones Act claim in his complaint; however, he raised that theory in the district court and tried his case on it without timely objection. *See infra* n.5. In his complaint, Evans alleged that he suffered orthopedic injuries which included a fractured nose, fractured ribs and a fractured coccyx. X-rays revealed that he did, in fact, suffer a fractured nose, but he produced no evidence to show any other orthopedic injury.

According to Evans, within one or two days of the accident, he and his wife noticed for the first time a slurring of his speech and a weakness and lack of balance in his walking. There has been a steady deterioration in his ability to speak or walk ever since the accident. His worsening condition has led to several serious falls since the accident. One, in February 1990, resulted in a

fractured wrist, and in May 1990 another led to a fractured hip. Evans has been treated by several neurologists since the accident. Sadly, as it turns out, Evans continues to suffer from a serious neurological disease which causes progressive deterioration of his motor functions. He is now unable to swallow because bulbar paralysis affects his tongue and, at the time of trial, could expect soon to be bound to a wheelchair. Because of his deteriorating condition, he has not piloted a vessel since November 10, 1989, and in June 1990 he was unable to pass the annual physical exam required to renew his state pilot's license.

Evans presented evidence that he was healthy before the September 1989 accident. In July 1989 in France, he had successfully completed a week long course in ship handling that is required of all Delaware Bay and River pilots. A fellow pilot who took the course with him did not notice any neurological or physical impairment. The evidence given at trial on Evans's good health before the accident is, however, conflicting. Dr. Bhatt, one of Evans's treating neurologists, testified that he complained of difficulty walking and with balance "for the last few months" at an examination on October 4, 1989. Joint Appendix (Jt. App.) at 79-80. Dr. Cook, another of Evans's treating neurologists, similarly noted on January 16, 1990, that "prefall," *i.e.* before the September 10, 1989, accident, Evans had complained that his legs were tired and his balance was off. Dr. Cook testified that at the time of the accident, Evans had not been diagnosed as having any motor neuron disease but that the condition probably existed in a dormant state.

Because of medical science's uncertainty in the face of neurological disorders similar to Evans's illness, no doctor has been able to provide a firm diagnosis of his neurological condition. Dr. Cook described Evans's illness as an unusual genus of motor neuron disease resembling amyotrophic lateral sclerosis ("ALS"). According to Dr. Cook, absent this accident, Evans's prognosis would have been unclear but he may never otherwise have experienced the disabling symptoms which now affect him.

Dr. Duvoisin, UASC's medical expert, after performing a neurological examination of Evans and reviewing his medical records, diagnosed Evans's condition as

olivopontocerebellar atrophy ("OPCA"), a condition with nerve degeneration that resembles ALS but otherwise also generally presents symptoms like those of Parkinson's disease. Dr. Cook testified that medical science does not know what causes ALS or any other motor neuron disease; but some controlled case studies reported in the medical literature indicate that trauma could be a causative factor of the disease or at least bring out the dormant symptomatology. Dr. Cook could not, however, testify with a reasonable degree of medical certainty that the trauma of the accident most likely precipitated an otherwise latent problem; he could state only that it was "entirely possible" and that he "relat[ed] the onset of Evans's motor neuron disease . . . to the fall he suffered on September 10, 1989." Jt. App. at 115, 116. Dr. Duvoisin, on the other hand, attempted to rule out trauma as a causal factor in Evans's neurological disease. He opined that there was probably a genetic link to the disease. He conceded, however, that he could not completely rule out trauma as a causative factor "one million percent" but considered it extremely improbable and "philosophically meaningless."[4] Jt. App. at 96-97. Medical articles reporting cases that could support the trauma theory were identified by the experts at trial but not introduced as affirmative evidence on Evans's behalf.

On July 30, 1991, after considering all of the evidence, the district court issued an interim opinion and order holding that Evans was a "seaman" under the Jones Act. *Evans I*, 767 F. Supp. at 1288-91. It further determined that Evans sustained personal injuries as a result of the negligence of the shipowner because the crew of the vessel had negligently rigged the platform and handrail of the accommodation ladder. *Id.* at 1292. It found that the handrail on the outboard side of the ladder was defective because a stanchion was missing, causing it to collapse when Evans leaned on it, *id.*, and that a motor neuron disease resembling ALS permanently disabled Evans. The court then found that the motor neuron disease preexisted

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4. We note that a physician's view of causation is not that of a judge or lawyer who thinks of causation not only in terms of etiology but also in terms of aggravation or, in the workers' compensation context, precipitation.

the fall but had been relatively asymptomatic and almost completely latent before the fall, and therefore the shipowner's negligence aggravated it. *Id.* at 1293.

The district court also found legal cause with respect to the orthopedic injuries. *id.* at 1292-93, but after considering the evidence, found that Evans missed only thirty-eight days of work, from September 11, 1989, until October 26, 1989, as a direct result of the accident. *Id.* at 1287. With respect to the aggravation of Evans's neurological disease, the court concluded "[i]f this were not a Jones Act case with its attendant 'featherweight' standard for proving causation, then this court would find that defendant's negligence did not proximately cause or aggravate plaintiff's neurological injuries." *Id.* at 1293. Under the featherweight standard of causation, the district court believed the circumstantial evidence was sufficient to permit an inference that Evans's fall from the ladder aggravated his neurological symptomatology. *Id.* Nevertheless, the district court was unable, without engaging in speculation, to separate the injury and damages attributable to the aggravation of Evans's neurological disease from those the disease would have caused in any event. *Id.* at 1294. Therefore, it ordered the record reopened for receipt and consideration of evidence on segregation of the damages attributable to the accident's aggravation of Evans's neurological disease from those caused by the underlying disease in its normal course. *Id.*

On November 22, 1991, the district court issued an order placing on Evans the burden of establishing the damages separately attributable to the shipowner's tortious aggravation of his latent motor neuron dysfunction because he was in the best position to do so. On February 6, 1992, the district court denied Evans's motion for reconsideration of its ruling on the burden of segregating damages. On March 17, 1992, the district court also denied UASC's motion for reconsideration of its determination that Evans was a Jones Act seaman.

In its final order and opinion, dated May 1, 1992, the district court entered judgment in favor of Evans on his Jones Act claim; however, the court held that Evans failed to produce evidence sufficient to establish the extent to

which his preexisting neurological condition was aggravated by the shipowner's negligence. *Evans II*, 790 F. Supp. at 518-20. The district court therefore awarded Evans damages only for his fractured nose plus lost earnings of $15,155.00 for thirty-eight days, medical expenses of $875.00 for treatment of the fractured nose, and $7,600.00 for pain, suffering, and loss of enjoyment for his nose injury together with prejudgment interest. *Id.* at 520. Evans filed a timely notice of appeal on May 29, 1992. UASC filed a cross-appeal on June 4, 1992.

II.

The district court had subject matter jurisdiction over this admiralty action under 28 U.S.C.A. § 1333 (West 1966) and the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1330 (West Supp. 1993). We have appellate jurisdiction over the final order of the district court pursuant to 28 U.S.C.A. § 1291 (West Supp. 1993).

Construction of the statutory term "seaman" is a question of law. *McDermott Int'l, Inc. v. Wilander*, 111 S. Ct. 807, 818 (1991). Thus we exercise plenary review over the district court's interpretation of the term "seaman" under the Act. Whether Evans ultimately qualifies as a "seaman" under the Act is a mixed question of law and fact. *Id.* This Court's cases leave things somewhat unclear about the scope of review over a district court's conclusion concerning a worker's status as an employee. In a Jones Act case, *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231 (3d Cir.), *cert. denied*, 112 S. Ct. 329 (1991), we stated, "The existence of an employer-employee relationship is a question of fact . . . ." *Id.* at 236. In a later case involving the Fair Labor Standards Act, *Martin v. Selker Brothers, Inc.*, 949 F.2d 1286 (3d Cir. 1991), we opined, "The employment status of the [employees] is a legal conclusion. Thus, our standard of review . . . is plenary." *Id.* at 1292 (citation omitted). We think these cases indicate that employer-employee status is sometimes, as here, a mixed question of law and fact. Accordingly, in this case we will exercise plenary review over the district court's selection of the standard by which employment status is judged, but overturn its subsidiary factual findings only if they are

clearly erroneous. *See* Fed. R. Civ. P. 52(a). Once the underlying facts are established, and the rule of law is undisputed, the issue of whether the facts meet the statutory standard is an issue of law. *McDermott*, 111 S. Ct. at 818.

III.

Jones Act Claim[5]

Congress passed the Jones Act in 1920 to overrule the United States Supreme Court's decision in *The Osceola*, 189 U.S. 158 (1903). *See McDermott*, 111 S. Ct. at 810-11. *The Osceola* held that seamen had a general maritime right to maintenance and cure and wages, as well as a right to recover for unseaworthiness, but were excluded from the general maritime negligence remedy against the shipowner. *See id.* at 810 (citing *The Osceola*, 189 U.S. at 175); *see*

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5. UASC alleges that Evans's Jones Act claim is barred because he failed to plead Jones Act status in his complaint. The Jones Act claim was, however, raised and argued fully at the bench trial. Federal Rule of Civil Procedure 15(b) provides when issues not raised by the pleadings are tried by implied consent of the parties, they shall be treated as if they had been raised in the pleadings. Amendments are to be freely granted upon motion even after judgment unless the opposing party can show prejudice. Fed. R. Civ. P. 15(b). In this case, Evans did not move to amend the pleadings. Failure to move to amend the pleadings to conform to the evidence does not affect the result of the trial.

Evans asserts that the Jones Act claim was argued without objection from UASC and therefore any objection has been waived. *See Altman v. Altman*, 653 F.2d 755, 758 (3d Cir. 1981) (issue not raised in district court will not be heard on appeal absent exceptional circumstances). UASC claims that it objected to Evans's Jones Act status in a letter-memorandum to the district judge dated March 24, 1992. There is no evidence of this letter in the district court docket sheet or the record before us. We are thus unable to consider it. In any event, this letter was allegedly submitted to the district court after conclusion of the bench trial on March 7, 1991, after the district court issued its interim opinion and order holding that Evans was a "seaman" under the Jones Act on July 30, 1991, and after the district court denied UASC's motion to reconsider its Jones Act status determination on March 17, 1992. Therefore, UASC failed to preserve this procedural issue for appeal.

also Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 328-29 (2d ed. 1975) ("The only purpose of the Jones Act was to remove the bar created by The Osceola, so that seamen would have the same rights to recover for negligence as other tort victims."). Because the Jones Act created new rights for "seamen," it should be liberally construed to accomplish its beneficent purposes. *See Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 790 (1949).

The Jones Act provides, in pertinent part:

> Any *seaman* who shall suffer personal injury *in the course of his employment* may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . .

46 U.S.C.A. app. § 688(a) (emphasis added). The Jones Act does not define the terms "seaman"[6] or "in the course of his employment." We have, on prior occasions, considered the scope of the term "seaman" but never in the context of a compulsory pilot. *See Mach v. Pennsylvania R.R. Co.*, 317 F.2d 761 (3d Cir. 1963); *see also Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). Case law that had developed on the definition of seaman before the Supreme Court's decision in *McDermott* required a permanent connection to a particular vessel, both generally and specifically, with respect to traditional compulsory pilots. *See, e.g., Bach v. Trident S.S. Co.*, 920 F.2d 322, 324-25 (5th Cir.), *vacated and remanded*, 111 S. Ct. 2253, *reaff'd on remand*, 947

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6. Statutory definitions of "seaman" appear only in an unrelated merchant seamen's protection and relief provision and a provision dealing with maritime commercial instruments and liens. The merchant seaman provision states: " 'seaman' means an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed in any capacity on board a vessel." 46 U.S.C.A. § 10101 (West Supp. 1993, Partial Revision). The maritime lien provision states: " 'seaman' means a master or a crewmember of a vessel in operation." 46 U.S.C.A. § 30101(5) (West Supp. 1993 Partial Revision).

F.2d 1290 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992); *Clark v. Solomon Nav. Ltd.*, 631 F. Supp. 1275, 1279 (S.D.N.Y. 1986). Following *McDermott*, the Court of Appeals for the Fifth Circuit held, over a vigorous dissent, the permanent connection requirement as applied to compulsory pilots survived *McDermott*. *See Bach*, 947 F.2d at 1291. This Court's case law is not entirely clear on how the permanent connection factor applies to persons who perform the core functions of a seaman on a vessel in navigation.[7] Because we conclude a compulsory river pilot such as Evans is not an employee of the vessel he pilots, he would be unable to recover under the Jones Act even if he is a seaman. Accordingly, we do not decide whether the requirement of permanent attachment survives *McDermott* with respect to Jones Act coverage of persons who, like compulsory pilots, perform core navigational functions on a traditional vessel plying the seas or waterways in the traditional way of trading vessels, as opposed to the various kinds of recently developed more or less fixed offshore platforms in whose context the permanent attachment

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7. In *Griffith*, we set forth three factors to determine whether a land based barge loader was covered under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1993) or under the Jones Act as a seaman. We required that (1) the ship be in navigation; (2) there be a more or less permanent connection with the ship; and (3) the worker be aboard primarily to aid in navigation. *Griffith*, 521 F.2d at 36 (quoting M. Norris, *The Law of Seamen* § 668 at 301 (3d ed. 1970)). In our previous decision in *Mach*, we had held that a bargeman who was permanently employed at a railroad dock and who was injured while moving a barge into position for unloading at the dock was a "seaman" under the Act. *Mach*, 317 F.2d at 764. *Mach* did not mention who owned the barges. *Griffith* distinguished *Mach* on the basis that the bargeman in *Mach* was *permanently* assigned to work at the river landing for the defendant railroad where a substantial amount of his work occurred on barges and involved navigational functions. *Griffith*, 521 F.2d at 38. *Mach*, the earlier case, could be controlling. It did not require permanent attachment to a particular vessel for Jones Act seaman status, but only a job in which a substantial portion of the employee's duties were performed in the navigation of a vessel. *Id.*

requirement was largely developed. *See Bach*, 920 F.2d at 333 (Brown, J., dissenting).[8]

The Jones Act provides a remedy for "any seaman who shall suffer personal injury *in the course of his employment* . . . ." 46 U.S.C.A. app. § 688(a) (emphasis added).[9] Thus, as a prerequisite to recovery under the Act, the plaintiff must establish an employment relationship with the defendant. *Matute*, 931 F.2d at 235-36 ("The Jones Act provides seamen a suit for damages against employers for injuries incurred while at sea, and the plaintiff must establish an employment relationship to recover under the Act."); *Simko v. C&C Marine Maint. Co.*, 594 F.2d 960, 963 n.2 (3d Cir.), *cert. denied*, 444 U.S. 833 (1979); *see also Cosmopolitan* Shipping, 337 U.S. at 790-91; *Haskins v. Point Towing Co.*, 421 F.2d 532, 536 (3d Cir.) ("Rights given under the Act are an outgrowth of the peculiar condition of a seaman's employment."), *cert. denied*, 400 U.S. 834 (1970); *McAleer v. Smith*, 818 F. Supp. 486, 192 (D.R.I. 1993). In this respect, the Act is the maritime equivalent of the Federal Employers' Liability Act ("FELA") covering railroad employees. *See* 46 U.S.C.A. § 688.

The district court did not engage in any detailed analysis of the employment question, instead holding that "on the

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8. We note that other courts, including, by implication, the United States Supreme Court, continued to recognize the continuing vitality of the permanent attachment requirement after *McDermott*. *See, e.g., Southwest Marine, Inc. v. Gizoni*, 112 S. Ct. 486, 494 (1991); *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 569 (9th Cir. 1992); *Bach*, 947 F.2d at 1291; *Harwood v. Partrederelt AF 15.5.81*, 944 F.2d 1187, 1192 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992). Most of the courts that have specifically considered the test's applicability to compulsory pilots have likewise concluded that a compulsory pilot is not a seaman under the Act because he lacks permanent attachment to an identifiable vessel or fleet of vessels. *See, e.g., Bach*, 947 F.2d at 1291; *Harwood*, 944 F.2d at 1192; *Stoller v. Evergreen Int'l (U.S.A.) Corp.*, No. C92-0466 FMS (N.D. Cal. Sept. 1, 1992); *Ray v. Great Lakes Towing Co.*, No. 3:92CV7034 (N.D. Ohio Feb. 25, 1992) (mem.); *Clark*, 631 F. Supp. at 1279. *But see Bach*, 920 F.2d at 331-33 (Brown, J., dissenting) (persuasively setting forth contrary and logical position).

9. Neither the legislative history of the Jones Act nor that of the LHWCA defines the phrase "in the course of his employment."

morning of September 10, 1989, [Evans] was acting [as a river pilot] aboard the M/V AL WATTYAH when the accident occurred. The ship's owner employed Mr. Evans through the services of the Pilot's Association .... Therefore, he had that 'employment-related connection' essential to determining seaman status." *Evans I*, 767 F. Supp. at 1291 (quoting *McDermott*, 111 S. Ct. at 817). Although making this limited finding with respect to the employment element, the district court did not explicitly determine whether Evans was an employee of UASC and injured "in the course of his employment," a prerequisite for Jones Act liability. Instead, it stated that Evans's work contributed to the mission of the ship and required him to confront the hazards of the sea faced by other members of the ship's crew and summarily concluded, "Mr. Evans, therefore, is entitled to the protection of the Jones Act." *Id.* In doing so, the district court appeared to confuse the in navigation prong of the seaman test with the additional requirement that a seaman be injured in the course of his employment. We believe it is necessary to determine separately whether the requisite employment relationship exists between UASC and Evans.

In determining Evans's employment status, we think it is proper to apply ordinary principles of the law of agency adjusted by an eye on the peculiarities of maritime life. Traditional agency law looks mainly to the degree of control the principal exercises over the agent. *See* Restatement (Second) of Agency § 220(1) (1958) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."). We have noted that factors indicating control include payment, direction, supervision and the power to hire or fire. *See Matute*, 931 F.2d at 236. Other factors include the power to determine the route of the ship and the activities of the crew. *See Cosmopolitan Shipping*, 337 U.S. at 795.

The relation of master and servant may exist although the law requires the selection of a worker from a limited class, and the master is liable for torts servants so selected commit within the scope of employment. Restatement

(Second) of Agency § 223. With respect to compulsory pilots, a comment to the Restatement specifically provides:

> c. *Compulsory pilots.* Under statutes requiring shipowners to accept the services of licensed pilots other than persons already in the shipowner's employ upon entering or leaving port, *the shipowner is not liable for the negligence of the pilot in the navigation of the ship, if the effect of the pilotage statutes is to remove control over the navigation of the ship from the shipowner and place it entirely in the pilot. In such case, the relation of master and servant does not exist between such owner and the pilot.* . . .

Id. § 223 cmt. c. (second emphasis added). We must consider, therefore, the pilotage statute which governs the relationship between Evans and UASC to determine the extent to which it gives control of the ship to the pilot.

The relevant Delaware statute provides for the licensing, training and discipline of pilots. *See generally* Del. Code Ann. tit. 23, §§ 103-137 (1987 & Supp. 1992). It also provides that all ships entering Delaware ports must take a compulsory pilot on board or face a lawsuit by the pilot who offered the services for full pilotage rates either *in personam* or *in rem* through a lien on the vessel.[10] The statute does not address the degree of control over the

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10. The statute provides, in relevant part:

> Every foreign ship or vessel and every ship or vessel engaged in foreign commerce or trade arriving from or bound to any foreign port or place, passing in or out of the entrance to Delaware Bay, and passing between the points of land known as the Capes of the Delaware, shall be obliged to receive a pilot. . . . If the master of any ships or vessels, after she is spoken or a pilot offered, refuses or neglects to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage of such ship or vessel to be recovered by a suit in the courts of this State . . . or such pilot may pursue his remedy therefor by a libel in admiralty in any United States court either in personam or by proceeding in rem, to enforce the lien given him on such ship or vessel, as such pilot may see fit and proper to do.

Del. Stat. Ann. tit. 23, § 121 (1987).

vessel that the pilot has and the master relinquishes. It is therefore of little help to our analysis.

UASC argues that Evans cannot bring suit against it under the Jones Act because Evans was either an independent contractor, as evidenced by his 1986-89 federal income tax filings as a self-employed taxpayer, or an employee of the Pilots' Association. Evans's tax treatment of his earnings as a pilot is relevant evidence on his employment status, but it is not determinative of the degree of control the shipowner could exercise over him.[11]

Few cases address the application of the Jones Act's employment requirement to compulsory pilots. None have held a compulsory pilot is an employee of a vessel he pilots. Instead, they have held that compulsory pilots are either employees of the pilots' association or independent contractors. *Compare Harwood*, 944 F.2d at 1189 (compulsory harbor pilot who was member of Virginia Pilots' Association held to function as independent contractor) *and Bach v. Trident Shipping Co.*, 708 F. Supp. 772, 773-74 (E.D. La. 1988) (compulsory pilot held to be independent contractor), *aff'd on other grounds*, 920 F.2d 322 (5th Cir.), *vacated and remanded*, 111 S. Ct. 2253, *reaff'd on other grounds*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992) *and Clark*, 631 F. Supp. at 1275 (parties agreed that compulsory river pilot who worked for his own company, a member of pilots' association, was independent contractor and not employee of shipowner in suit by pilot brought solely under general maritime law) *with Ray v. Great Lakes Towing Co.*, 92 Civ. 7034 (N.D. Ohio Feb. 25, 1992) (compulsory pilot was employee of pilots' association). *But see Guy v. Donald*, 203 U.S. 399, 407 (1906) (in negligence action by shipowner against members of pilots' association for negligence of its compulsory pilot, association held not liable because had no control over shipboard job performance of its members).

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11. Given the nature of the tasks a compulsory pilot performs, it is difficult to conceive of any other federal taxation category into which Evans would fit. The determination of employee status depends on substance not form, and we decline to accord Evans's tax treatment controlling weight.

In the case at bar, we are persuaded that there is no employer-employee relationship between Evans and the shipowner. In *Bach*, the district court discussed *Magnolia Towing Co. v. Pace*, 378 F.2d 12, 13 (5th Cir. 1967) (per curiam) which affirmed a Jones Act verdict in favor of a river pilot who had worked directly for the defendant for one year, was paid a monthly salary by the defendant and was therefore permanently assigned as pilot to one or another of the defendant's tugboats. The *Bach* court distinguished *Pace* because the pilot in *Pace* was a permanent, salaried employee of the defendant. *Bach*, 708 F. Supp. at 773. On appeal, the employer-employee relationship was not put in issue. *Bach*, 920 F.2d at 324-26. The district court in *Bach* had held that a compulsory pilot, a member of the pilots' association, was an independent contractor even though the shipowner had a right to refuse the pilot's services and incur the penalties the pilotage statute imposed, and the pilot fee was characterized as "wages." *Bach*, 708 F. Supp. at 773-74. The district court concluded that these facts were not inconsistent with a compulsory pilot's status as an independent contractor. *Id.* We agree with the district court in *Bach* that these facts are insufficient to show that a compulsory pilot is employed by the vessel piloted. *See also Bach*, 920 F.2d at 327 n.5 (record did not show that compulsory pilot was employee of anyone).

The cases that concern a shipowner's liability for a pilot's negligence are instructive. Generally, shipowners are not liable for torts committed through the negligence of a compulsory pilot under the theory that the owner had no discretion to select the individual. *See The China*, 74 U.S. (7 Wall) 53 (1868). The vessel, however, may be held liable *in rem*. *See id.* Where the pilot is taken at the discretion of the shipowner, the case for a master-servant relationship is stronger and the owner may be held to answer for the torts of the pilot. *See Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406, 416 (1901) (quoting Story, Treatise on Agency 2d ed. § 456a); *see also* Black & Gilmore, *supra*, § 7-16 at 520 ("A pilot may be taken on voluntarily *or* under the compulsion of some local statute or regulation. The voluntary pilot is in much the same position as any other crew member. . . . [I]f

the pilotage is 'compulsory' the *respondeat superior* nexus is broken, and the shipowner cannot be held personally liable for the fault of the pilot resulting in collision."). Even in the case of the compulsory pilot, though, the shipowner may still be liable *in personam* if found to be somehow at fault. *See Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen*, 404 F.2d 1001, 1007 (4th Cir. 1968) (statutory pilot's presence does not lessen master's duty or authority and shipowner held responsible if master fails to act to correct pilot's dangerous actions); *see also City of Los Angeles v. Standard Transp. Co.*, 32 F.2d 988 (9th Cir. 1929) (safety of all aboard remains with master despite presence of municipal pilot); *Robins Dry Dock & Repair Co. v. Navigazione Libera Triestina S.A.*, 32 F.2d 209, 210 (2d Cir.) (ship captain not totally divested of authority by presence of compulsory pilot), *cert. denied*, 280 U.S. 574 (1929); *cf. The China*, 74 U.S. (7 Wall) at 67-68 (owner may countermand pilot upon discovery of pilot's incapacity or intoxication).

The Delaware statute that required UASC to take Evans on board and accept his services as a pilot is similar to the New York pilotage law the Supreme Court considered in both *Homer Ramsdell* and *The China*. *Compare* Del. Stat. Ann. tit. 23, §§ 117, 121-26 *with* N.Y. Navigation Law § 88 (McKinney 1992). In *Homer Ramsdell*, the Supreme Court held in the case of a compulsory pilot that neither the master nor the shipowner was liable for the negligence of the pilot under common law because the " 'pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them, and the maxim, *Qui facit per aliam facit per se*,[12] does not apply.' " *Homer Ramsdell*, 182 U.S. at 416 (footnote added) (quoting Story, Treatise on Agency 2d § 456a)). Application of this maxim to the relationship between shipowner and compulsory pilot was essential to the result in that case.[13]

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12. The Latin means, "He who acts through another acts himself." Black's Law Dictionary 1124 (5th ed. 1979).

13. The United States District Court for the Eastern District of New York, in a single case, has held that where, under the same New York statute, the vessel could elect to engage a pilot or to have the ship piloted by its

It remains material here, where UASC was also required by statute to pay a fee for Evans's compulsory services. At the completion of the voyage, the ship's master signed the pilot's "ticket" acknowledging that Evans was on board and performed services. Evans subsequently dispatched an invoice for those services to the shipowner. Evans stated in his deposition that he was a self-employed member of the Pilots' Association. As in *The China*, the master of the vessel retained the ability to countermand the pilot in exceptional circumstances and did not relinquish all right of control over the vessel to the compulsory pilot. *See Charente S.S. Co. v. United States*, 12 F.2d 412, 413 (5th Cir. 1926) (master may displace pilot in instance of manifest incompetence); *In re Hercules Carriers, Inc.*, 566 F. Supp. 962, 974, 978-79 (M.D. Fla. 1983), *aff'd*, 761 F.2d 1558 (11th Cir. 1985). But the master has no discretion in selecting or firing a pilot or taking control from him absent an extraordinary situation. The compulsory pilot is in supreme command of the vessel while he is navigating it. Only if he displays gross negligence does the master have the authority to remove a compulsory pilot from the helm or to countermand the pilot's orders and the master, if he does so, acts at the risk of penalty for violation of the state regulatory provision. *See The China*, 74 U.S. at 67-68; *cf. Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 94 (1955) ("Under law and custom [pilots] have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. . . . As a rule no employer, no person, can tell them how to perform their pilotage duties. . . . [P]ilots are usually free to

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master and pay the pilotage, the pilot engaged by the vessel was an "employee" within the Jones Act with regard to liability for the pilot's death, and *Homer Ramsdell* was not controlling because it presented a situation where a third party was attempting to sue the shipowner for the pilot's negligence. *Peterson v. United New York Sandy Hook Pilots' Ass'n*, 6 F. Supp. 649 (E.D.N.Y. 1934). That case has not been overruled but it also has never been cited and seems directly contrary to the decision in *Homer Ramsdell*. Moreover, the Delaware pilotage statute states that ships entering state waters "shall be obliged to receive a pilot." Del. Code Ann. tit. 23, § 121. No alternative is present and non-compliance requires a forfeiture of the pilot fee. *See id.*

act on their own best judgment while engaged in piloting a vessel."). While we recognize that the master of the vessel may be found negligent and have his license suspended or revoked if he fails to take action to relieve a pilot when he concludes that the pilot is taking the vessel into danger, *see The Oregon*, 158 U.S. 186, 194 (1895); *Ralli v. Troop*, 157 U.S. 386 (1895); *Chesapeake Bay Bridge and Tunnel*, 404 F.2d at 1007, we think this limited control is insufficient to import an employer/employee relationship under the maxim which supplies the Supreme Court's rationale in *Homer Ramsdell*.

Because the principles enunciated in *Homer Ramsdell* are similar to those applicable to the instant case, we believe the vessel and its master, acting in accord with the Delaware statute, lack the ability to control in the degree necessary to create a master-servant relationship. This result seems to us compelled by the shipowner's lack of any choice or discretion in selecting a pilot and the extremely limited circumstances under which an owner may direct the pilot's activity on board the vessel. Though the Supreme Court has recognized in dicta that "the word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied," it also cautions us that it would be wrong to "disregard the plain and rational meaning of employment and employer to furnish a seaman a cause of action against one completely outside the broadest lines or definitions of employment or employer." *Cosmopolitan Shipping*, 337 U.S. at 790-91. Accordingly, we hold that Evans has failed to demonstrate the employment relationship with UASC that the Jones Act requires to support his claim.[14]

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14. UASC has conceded the propriety of the orthopedic damages and, therefore, we will affirm that award. It says:

> If this court agrees that Evans is not a Jones Act seaman, then [sic] district court's finding of aggravation should be *reversed*, and the total damages awarded for his orthopedic injuries *affirmed*. . . . Should the district court's finding as to Evans' seaman status be reversed, all other argument will be moot as the present appeals

IV.

In summary, we hold that Evans lacks the requisite employment relationship with the shipowner and is therefore not entitled to maintain a Jones Act action against it. The district court did not err in concluding Evans failed to establish causation between the shipboard accident and aggravation of his preexisting neurological condition without the benefit of the Jones Act featherweight standard of causation. Evans is entitled to recover for his orthopedic injuries, an award of damages conceded by the shipowner. We will therefore affirm the judgment and order of the district court awarding Evans damages only for his orthopedic injury, lost earnings, and pain and suffering resulting therefrom.

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flow from the court's ruling on Jones Act status. Evans and shipowner do not raise any issue with damages for orthopedic injuries, the only damages awarded.

Brief for Appellee/Cross-Appellant UASC at 4 (emphasis in original). Thus, no remand on discussion concerning the propriety of those damages is necessary.

NYGAARD, *Circuit Judge*, dissenting.

The majority does not disturb the district court's conclusion that Evans is a Jones Act seaman, but concludes that the court erred by finding that United Arab "employed" Evans. I dissent because I conclude that the district court properly found Evans to be a seaman and employed by United Arab. Thus, he is entitled to coverage under the Jones Act.

I.

By its express terms, the Jones Act provides remedies for sea-based maritime workers and thus covers only "seamen." The Jones Act does not define "seaman." But the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, which provides remedies for land-based maritime workers, excludes from its coverage "a master or member of a crew of any vessel." This term is a refinement of "seaman" in the Jones Act. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 813 (1991). "Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute." *Id.*

Traditionally, the elements necessary to determine who is a "seaman" have been " '(a) that the ship be in navigation; (b) that there be a more or less permanent connection with the ship; and (c) that the worker be aboard primarily to aid in navigation.' " *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 36 (3d Cir. 1975), quoting Martin Norris, The Law of Seaman § 668, at 301 (3d ed. 1970). The Supreme Court has since eliminated the last requirement, holding that it "is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel . . . ." *Wilander*, 111 S.Ct. at 817.

Although it is undisputed that the M/V AL WATTYAH was in navigation, the parties dispute whether Evans was "more or less permanent[ly] connect[ed]" to the vessel. The majority does not resolve this issue, believing it is unclear how the "permanent connection" factor applies to a pilot, who is not permanently connected to any vessel in the temporal sense but who nonetheless performs the core

navigational functions of a seaman and unquestionably is essential to the ship's mission. The confusion arises because it is difficult to define the nature of the required connection between the worker and the vessel: that is, does a "permanent connection" mean a lasting temporal relationship with the particular vessel, or something else?

In *Mach v. Pennsylvania R.R. Co.*, 317 F.2d 761 (3d Cir. 1963), coal transported from barges under tow had to be loaded onto railway cars. Because the barges were not self-propelled, when a towing vessel released a barge, a bargeman hired by the railway took control of it. "In brief, all the handling and attending of barges, from the time a tow boat releases its flotilla, through the unloading, until the time when the empty barges are towed away, is done by the bargeman." *Id.* at 762-63. The issue was whether a bargeman under these circumstances was a "seaman." We held he was, reasoning:

> The work of causing a boat to move in navigable water is the most fundamental and characteristic function of a ship's crew. From the release of loaded barges from their tow until the departure of empty barges under tow, all of the ship's service which a barge required was performed by bargemen who took the place of whatever crew handled them during their journeys up and down the river.
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> The duration of service for and upon a vessel may determine whether shipboard work which is not normally performed by a ship's company makes the worker a crewman, *but lack of long continued attachment to the vessel cannot, as a matter of law, serve to deny seaman's status under the Jones Act to an employee who is injured while assigned to and performing normal crew service.*

Id. at 763-64 (emphasis added).

In *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), we held that a worker who was temporarily assigned to work on barges and whose only contact with ships amounted to fewer than four of the seventy-four days

he had been employed, was not a seaman. In distinguishing *Mach*, we opined that "the bargeman in *Mach* was permanently assigned to work at the river landing where he performed a substantial amount of his work time on the barges, which duties involved significant navigational functions, and who was injured while moving a loaded barge." *Id.* at 38. Thus, under Third Circuit law the permanent connection factor is not a temporal relationship with any particular ship, but is employment-related and focuses instead on the nature of the worker's duties as they relate to the ship and the ship's mission at the time of the injury. Our case law is consistent with traditional maritime law and the Jones Act.

The Supreme Court noted that traditional seamen's remedies have been universally recognized as growing out of " 'the special hazards and disadvantages to which they who go down to the sea in ships are subjected.' " *Wilander*, 111 S.Ct. at 817, quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104, 66 S.Ct. 872, 882 (1946) (Stone, C.J., dissenting). "All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* Pilots, no less and perhaps more than any other member of a crew, are subjected to the perils of the sea. See *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 330 (5th Cir. 1991) (Brown, J., dissenting) ("Navigation in and out of ports and harbors, and within restricted waters, poses special hazards that are not presented when sailing on the high seas."). By enacting the LHWCA and the Jones Act, Congress distinguished between land-based and sea-based employment and provided remedies to those who are a "master or member of a crew," and thus facing the special dangers of the sea, and to those who are not. *Wilander*, 111 S.Ct. at 817.

This distinction is the heart of the permanent connection factor because the "key to seaman status is employment-related connection to a vessel in navigation." *Id.* Since "a seaman must be doing the ship's work," that connection shows that the worker is " 'contribut[ing] to the function of the vessel or to the accomplishment of its mission' . . . ." *Id.*, quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th

Cir. 1959). And, since such a job exposes the worker to the particular hazards of the sea, there is no good reason why he should not be covered by the protection of maritime law, statutory as well as decisional. See *The Arizona v. Anelich*, 298 U.S. 110, 123, 56 S.Ct. 707, 711-12 (1936) (Jones Act protects seamen who are wards of admiralty and so must be broadly construed to attain that end). Thus, failing to show a lasting relationship between a worker and a particular vessel does not change either the fact that one doing a ship's work faces all the special dangers of sea-based maritime employment, or that a seaman's status depends on the nature of the worker's duties as they relate to the ship. See *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1412 (9th Cir. 1990) ("the term 'seaman' includes a broad range of marine workers whose work on a vessel on navigable waters contributes to the functioning of the vessel, to accomplishment of its mission, or to its operation or welfare"). See also 46 U.S.C. § 10101(3) ("seaman" means an individual "engaged or employed in any capacity on board a vessel").

No one disputes that Evans was injured in the course of successfully navigating the M/V AL WATTYAH. *Evans v. United Arab Shipping Co.*, 767 F.Supp. 1284, 1285 (D.N.J. 1991). Because he contributed to the function of the vessel and to the accomplishment of its mission, he was a seaman; and merely because he was not connected to the vessel in a long-term temporal sense cannot, as a matter of law, take away his rights under the Jones Act. *Mach*, 317 F.2d at 763-64.

II.

A plaintiff must also show an employment connection with the defendant. *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 236 (3d Cir. 1991). After a bench trial, the district court specifically found that United Arab "*employed* Mr. Evans through the services of the Pilot's Association, an organization of river pilots in the area." *Evans*, 767 F.Supp. at 1291 (emphasis added). The majority believes that the court clearly erred in making this finding.

The question of whether a defendant is an employer for the purposes of the Jones Act is normally a factual one

within the province of the fact-finder. *Welsh v. Utah Dredging Co.*, 403 F.2d 217 (3d Cir. 1968); *Wheatley v. Gladden*, 660 F.2d 1024, 1026 (4th Cir. 1981); *The Norland*, 101 F.2d 967, 973 (9th Cir. 1939). Thus, the fact-finder's determination should not be disturbed if there is a rational evidentiary basis for its conclusion.

General rules of agency may help to determine if an employment relationship exists. One must remember, however, that the Jones Act is a remedial legislation extending to seamen the rights accorded railway workers under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* It benefits and protects seamen who are peculiarly the wards of admiralty, and so it must be liberally construed to attain that end. *The Arizona*, 56 S.Ct. at 711-12, citing *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 375, 53 S.Ct. 173, 175 (1932); *Jamison v. Encarnacion*, 281 U.S. 635, 639, 50 S.Ct. 440 (1930); *Alpha S.S. Corp. v. Cain*, 281 U.S. 642, 50 S.Ct. 443 (1930); *Warner v. Goltra*, 293 U.S. 155, 157, 55 S.Ct. 46 (1934). "Congress intended that the purposes of [FELA and the Jones Act] should not be restricted by common-law concepts of control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality a part of the processes and dependent upon the businesses to which they rendered service." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 69 S.Ct. 1317, 1321 (1949). Thus, "the word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied." *Id.*, 69 S.Ct. at 1321. Rather, courts should construe "employment" in "the broadest lines or definitions of employment or employer." *Id.*

With this in mind, I cannot agree with the majority's conclusion that the district court erred by finding that Evans was employed by United Arab. I conclude there is sufficient evidence to support this finding. It is undisputed that United Arab paid money for Evans' services. Indeed, Delaware law gives a pilot a cause of action for wages against the shipowner. Del. Stat. Ann. tit. 23 § 121 (1987).

By the plain meaning of "employment," Evans was engaged in the services of United Arab.

Moreover, although control is said to be the most important factor in determining whether the plaintiff is an employee of the defendant, *United States v. W. M. Webb, Inc.*, 397 U.S. 179, 90 S.Ct. 850, 856 (1970), it is not significant in determining whether a pilot is an employee because "a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage-ground, is *the temporary master* charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew." *Cooley v. Board of Wardens*, 53 U.S. 299, 316 (1851) (emphasis added). There is no question that a master is covered under the Jones Act. *Warner v. Goltra*, 293 U.S. 155, 55 S.Ct. 46, 48 (1934). Thus, although a master, as the agent and representative of the shipowner, controls the ship's crew, it cannot be said that the shipowner controls the master in the daily, nautical routines and functions of the ship. Nor should one expect to conclude that a pilot, who is the only person with specialized skills and knowledge necessary to navigate ships in unfamiliar waters, is controlled in his employment by the shipowner.

"The services of the pilot are as much for the benefit of the vessel and cargo as those of the captain and crew. His compensation comes from the same source as theirs. Like them he serves the owner and is paid by the owner. If there be any default on his part, the owner has the same remedies against him as against other delinquents on board. The difference between his relations and those of the master is one rather of form than substance." *The China*, 74 U.S. 53, 67 (1868).

I believe that the district court, as a trier-of-fact, did not err when it found that Evans was "employed," in either the plain or liberal sense of that term, by United Arab. Furthermore, even if, as the majority asserts, the district court "appeared to confuse the in navigation prong of seaman test [which requires an employment-related connection to the vessel] with the additional requirement" that there be an employment connection with the defendant, I would not decide the issue as a matter of law

on appeal, but would remand for the district court to consider the issue in the first instance. See *Matute*, 931 F.2d at 236 (in Jones Act cases "existence of an employer-employee relationship is a question of fact"); Martin Norris, *The Law of Seamen*, § 30:14 at 369 & nn. 70-71 (4th ed. 1985) (determination of whether an employment relationship exists is a question of fact and should be left for the trier-of-fact to decide) (collecting cases).

III.

Because Evans is a Jones Act seaman and was employed by United Arab, he is entitled to coverage under the Jones Act. He is thus entitled to the Jones Act's "featherweight" causation standard, under which the district court concluded that United Arab's negligence aggravated his preexisting neurological condition. It is then incumbent upon United Arab, the proven tortfeasor, rather than Evans, the innocent plaintiff, to show that damages can be segregated.[1] Because the district court erroneously placed this burden on Evans, I would reverse and remand for further proceedings.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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1. "[W]hen a plaintiff has a preexisting condition that would inevitably worsen . . . the burden of proof in such cases is upon the defendant to prove the extent of the damages that the preexisting condition would inevitably have caused." *Maurer v. United States*, 668 F.2d 98 (2d Cir. 1981). See Restatement (Second) of Torts § 433B, comment d (1965) ("As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.").

WILLIAM W. EVANS,

Plaintiff,

v.

UNITED ARAB SHIPPING COMPANY (S.A.G.) and M/V AL WATTYAH, her engines, boilers, equipment, etc.,

Defendants.

Civ. No. 89-5246(SSB).

United States District Court,
D. New Jersey.
July 30, 1991.

FINDINGS OF FACT and CONCLUSIONS OF LAW

BROTMAN, District Judge:

In reaching its findings of fact and conclusions of law in this maritime suit for negligence, the court must confront an issue explicitly left open by the Supreme Court's recent decision in *McDermott Internation, Inc. v. Wilander,* ___ U.S. ___ , 111 S. Ct. 807, 112 L.Ed.2d 866 (1991): whether a river pilot who is not permanently attached to a ship is a Jones Act seaman. Because the court finds that a river pilot was a seaman under general maritime law at the time Congress passed the Jones Act in 1920, it concludes that this plaintiff is entitled to the protection afforded by that Act.

JURISDICTION

This is an admiralty and maritime claim by the plaintiff for personal injuries against the defendant, which is a sovereign owned shipping company. Jurisdiction is based on 28 U.S.C. § 1333 and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330. This court held a nonjury bench trial on March 4-7, 1991.

FINDINGS OF FACT

1. Plaintiff, William W. Evans, was at all times material to the events leading up to this suit licensed as a first class pilot by the state of Delaware, Board of Pilot Commissioners, and the United States Coast Guard and was a member of the Pilot's Association for the Bay and River Delaware. Mr. Evans has performed his entire career (over forty years) as a licensed pilot hired to steer ships through the Delaware River and Bay and the Chesapeake and Delaware (C & D) Canal.

2. Defendant, United Arab Shipping Company (UASC), owns and operates the container freight M/V AL WATTYAH. UASC is owned by the governments of Saudi Arabia, Kuwait, Iraq, United Arab Emirates, Bahrain and Qatar. The M/V AL WATTYAH is a diesel-powered vessel of 20,526 tons, 183.24 meters in length, 27.49 meters in beam and 10.015 meters in depth.

3. On the night of September 9-10, 1989, Mr. Evans was on call at the pilot station at Lewes, Delaware. At approximately 1:00 a.m., he was called to pilot the M/V AL WATTYAH toward the C & D Canal as far as Chesapeake City, Maryland, where a Maryland pilot would take over the helm. At approximately 2:00 a.m., Mr. Evans was taken by pilot to launch to the ship, which was situated in the pilotage area between Cape May and Cape Henlopen; he boarded the ship by pilot ladder, also known as a Jacob's ladder, which is a rope ladder with wooden rungs. Mr. Evans experienced difficulty with the pilot ladder due to its poor condition. He then assumed the "conn" of the vessel at approximately 2:30 a.m. and, without incident, piloted the ship toward the Maryland border in clear and calm weather.

4. Upon approaching the point where the Maryland pilot would be boarding, Mr. Evans requested the master of the vessel to have the starboard side accommodation ladder rigged to allow his disembarkation; plaintiff wanted to avoid using the faulty pilot ladder. An accommodation ladder is used in calm waters on ships without

excessive freeboard. It is a staircase built of galvanized steel or aluminum that is attached at its top to the main deck of the vessel and is lowered by means of a winch to within a few feet of the water's surface. At the lower end is a platform that can be adjusted, depending on the height of the vessel's freeboard and the ladder's angle of suspension, to remain parallel with the water's surface. This lower platform is fixed in position after adjustment by means of a pin which passes through an intersecting "sandwich" of metal bars and holds it rigidly in place.

The accommodation ladder is also equipped with handrails that are designed to fold back along the channels of the ladder by means of pivoting stanchions. When the ladder is fully extended, the stanchions are designed to pivot upright and then be secured with chains or ropes.

5. The Maryland pilot was transported to the M/V AL WATTYAH by the pilot launch at Chesapeake City, which was driven by John Stringer. When the launch was in position alongside the ship, the Maryland pilot stepped from the foredeck of the launch directly on to the lower-most rung of the accommodation ladder, stepping over the lower platform. Transcript of March 4 at 38-41 (testimony of Stringer).

6. Some minutes later, a seaman headed down the accommodation ladder to deliver Mr. Evans' briefcase and to assist him in leaving the ship. As the seaman stepped on the lower platform it pivoted on its axle and dropped, causing the sailor to fall. The seaman was able to hoist himself aboard the launch, then examined the lower platform on hands and knees. According to Stringer, he appeared to be reaching for something and adjusting the underside of the lower platform. Transcript of March 4 at 42.

7. At this time, Mr. Evans appeared at the upper platform of the accommodation ladder and saw that the sailor was on his hands and knees adjusting the lower platform. Mr. Evans asked the two officers who had accompanied him to the ladder what the sailor was doing

and whether it was safe to use the ladder. Neither officer responded with anything more than a shrug of the shoulders. Evans Deposition at 87-88. Mr. Evans then shouted down to the sailor, who by this time was on his feet facing up the ladder with one hand on the ladder's handrail and the other on the launch's bow rail. The seaman made no gesture or sign to Mr. Evans other than to make direct eye contact, which he understood as an indication that the ladder was safe; he then began his descent. On his way down he noticed a pile of rope in disarray on the lower platform.

8. When Mr. Evans reached the lower-most rung of the ladder with his left foot, he placed his right foot on to the lower platform and released his hand from the inboard handrail. He then began to swing his left leg over to the deck of the launch but when he transferred his weight to his right leg, the platform dropped, pivoting on its axle. Mr. Evans then attempted to prevent himself from falling between the ship and launch by shifting his weight to the outboard handrail. This handrail collapsed, however, and Mr. Evans' body swung in a 270 degree turn. His tailbone (coccyx) hit the deck of the launch and his face and left rib cage struck the outboard channel of the accommodation ladder. Evans Deposition at 46-53. The sailor then assisted Mr. Evans on to the launch.

9. Plaintiff's version of this event was unrebutted at trial and was corroborated in significant detail by Mr. Stringer, the launch driver, who witnessed the entire incident. Although he did not actually see the platform collapse, both times he heard a "clang" sound and he saw Mr. Evans fall. March 4 Transcript at 43-45. When Mr. Evans entered the launch's cabin, Mr. Stringer said, "The same exact thing happened to that crewman." Evans Deposition at 54. He also observed that Mr. Evans appeared visibly shaken and pale, and did not assist, as was his custom, with the handling of mooring lines upon reaching the dock. Transcript of March 3 at 45-46. Mr.

Evans took a taxicab to his car, then drove himself home and went to sleep.

10. Mr. Evans was experiencing pain in his nose, ribs and tailbone. When he arose the morning of September 11, he blew his nose and "blood just gushed out." Evans Deposition at 63. He immediately contacted his family physician, Dr. Bell, who had x-rays taken of his spine, ribs and nose. The x-rays revealed that Mr. Evans had suffered a fractured nose; plaintiff claims that he also suffered a fractured coccyx and a possible fractured rib but was unable to present any corroborating evidence to that effect.

11. Mr. Evans was on medical leave from his piloting duties for an extended period of time. There was some factual dispute at trial as to the amount of time that passed before Mr. Evans was able to recover sufficiently from his orthopedic injuries to return to work. The Pilot Association's logbook indicates that Mr. Evans next piloted a ship on October 26, 42 days after the accident on the M/V AL WATTYAH. However, Mr. Evans had to wait several days between the time he informed the dispatcher that he has available for work and his first assignment. March 6 Transcript at 31-32. Therefore, the court concludes, Mr. Evans' orthopedic injuries caused him to miss 38 days of work.

12. Within one or two days after the September 10 accident, Mr. Evans and his wife each noticed for the first time a distinct slurring of his speech and a pronounced weakness or lack of balance in his gait. He immediately sought medical attention for these symptoms and was referred to a specialist in neurology. Unfortunately, however, Mr. Evans' speech and balance problems increased to such an extent that, when he returned to piloting on October 26, numerous complaints were registered about the hazards presented by his condition. At the request of the Association's president and upon the advice of his doctors, Mr. Evans took a medical leave of absence beginning November 10, 1989. In June, 1990, he was unable to pass the physical

exam he needed to renew his state pilot's license, which expired on September 1, 1990. He has not piloted a boat since November 10, 1989.

Since the first symptoms of plaintiff's neurological condition appeared, there has been a steady deterioration in his ability to speak and walk. Mr. Evans has fallen several times, fracturing his hip and wrist, and is expected to be wheelchairbound shortly. At trial, Mr. Evans walked with the assistance of a walker and his speech was dramatically slurred. His doctors predict that he will die within one or two years; however, if he elects to use artificial respiratory and nutritional devices, and with the assistance of 24-hour residential nursing care, he could prolong his life another year or two beyond that time.

13. A professional associate of the plaintiff, pilot George Mcintire, was with him for a full week in early July, 1989 at a ship handling school in Grenoble, France. According to Mcintire, who was with him during that entire week, plaintiff appeared healthy and vigorous at all times; they took long walks together each evening and he participated fully in the school's curriculum. No signs of any neurological problems were evident.

14. Dr. Cook, Mr. Evans' medical expert in neurology and treating neurologist, noted on January 16, 1990 that "prefall," *i.e.,* before the September 10 accident on the AL WATTYAH, plaintiff said his legs were tired and his balance was off. March 5 Transcript at 32-33. Dr. Bhatt, plaintiff's other treating neurologist, similarly testified that at plaintiff's examination on October 4, 1989, he had complained of difficulty walking and with balance "for the last few months." March 7 Transcript at 24.

15. No doctor has been able to provide a definitive diagnosis of Mr. Evans' neurological condition. Dr. Cook described it as an unusual genus of motor neuron disease that resembles amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease. He also

testified that Mr. Evans' disease probably pre-existed the fall but laid dormant. Defendant's medical expert, Dr. Duvoisin, submitted a pretrial report stating that plaintiff's symptoms resembled olivopontocerebellar atrophy and Parkinsonism, and ultimately described it as a chronic progressive diffuse neurodegenerative disorder. Defendant's Exhibit 1B. At trial, Dr. Duvoisin said that plaintiff probably had a nerve degeneration problem similar to ALS.

16. The state of medical knowledge as to the causation of motor neuron disease like that present in Mr. Evans is similarly imprecise. Dr. Cook stated outright that "[w]e don't really know what causes motor neuron disease or ALS." March 5 Transcript at 18. Dr. Cook testified that there is anecdotal evidence in the medical literature that trauma is a causative factor of the disease. It was his opinion that it was "likely" or "possible" that plaintiff's pre-existent motor disease was aggravated by the traumatic event on September 10. However, he could not say that it was "probable."

Dr. Duvoisin categorically ruled out trauma as playing any causative role in plaintiff's neurological problems. March 7 Transcript at 34-35. Dr. Duvoisin described his research as exclusively directed toward finding a genetic link to the disease. On cross-examination, he was presented with four research articles listing trauma as one possible cause of the disease but dismissed them as not convincing. Ultimately, he conceded that he would not conclusively rule trauma out as a causative factor, though he considered it so improbable as to be "philosophically meaningless." March 7 Transcript at 42.

CONCLUSIONS OF LAW

A. *Evans' Status as a Jones Act Seaman*

The threshold question before the court is whether Mr. Evans, as a river pilot, is a "seaman" and therefore entitled to the protection of the Merchant Marine Act of 1920, otherwise known as the Jones Act, 46 U.S.C.App. § 688. As we shall see, the answer is "of paramount importance" to the outcome of plaintiff's case, since "the seaman's remedies are far more favorable than those available to other maritime workers." Robertson, *A New Approach to Determining Seaman Status,* 64 Tex. L.Rev. 79, 83 (1985).

Defendant argues that plaintiff cannot possibly meet the traditional common law requirement that a Jones Act seaman be permanently assigned to defendant's vessel or perform a substantial amount of his work aboard it. *See Bach v. Trident Steamship Co.,* 920 F.2d 322 (5th Cir.1991) (river pilot is not a Jones Act seaman because not permanently attached to a vessel or fleet of vessels); *King v. Universal Electric Construction Co.,* 799 F.2d 1073 (5th Cir.1986). This court's reading of the cases supporting defendant's argument would compel it to agree. *See, e.g., Griffith v. Wheeling Pittsburgh Steel Corp.,* 521 F.2d 31 (3d Cir.1975), *cert. denied,* 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976); *Clark v. Solomon Navigation, Ltd.,* 631 F.Supp. 1275 (S.D.N.Y.1986). Plaintiff argues that the Supreme Court's recent decision in *McDermott* leads to the inevitable conclusion that the "permanent attachment" element of seaman status is no longer required; it is enough that plaintiff was employed to assist in the performance of the vessel's functions. In addition, the court notes that reliance on the Fifth Circuit's decision in *Bach* would be dangerous in light of the Supreme Court's recent decision to remand *Bach* "for further consideration in light of *McDermott.*" ___ U.S. ___ , 111 S.Ct. 2253, 114 L.Ed.2d 706 (1991).

The court's inquiry, of course, must begin with the Supreme Court's unanimous decision in *McDermott*, ___ U.S. ___ , 111 S.Ct. 807, 112 L.Ed.2d 866 (1991).[1] The question before the Court on that occasion was whether a paint foreman, who did not aid in a ship's navigation, nevertheless qualified as a seaman under the Jones Act. The Court answered this question in the affirmative by jettisoning the aid in navigation requirement. Since the Jones Act does not define who a seaman is,[2] the Court assumed that Congress intended to use the term in the same way that other admiralty courts had used it. *Id.* at 811. The Court's first task, therefore, was to determine who was a seaman under the general maritime law when Congress passed the Jones Act. *Id.*

The Court then conducted an in-depth analysis of the historical bases of the maritime worker's negligence suit against the ship's owner and found that a great variety of shipworkers were considered seamen at the

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1. As the Supreme Court acknowledged in *McDermott*, its precedents in this area "led the lower courts to a 'myriad of standards and lack of uniformity in administering the elements of seamen status.' " *Id.*, 111 S.Ct. at 816, *quoting* Engerrand & Bale, *Seaman Status Reconsidered*, 24 S.Tex.L.J. 431, 494 (1983).

2. The only definition of "seaman" provided by Congress is found at 46 U.S.C. § 10101, which states: (3) "seaman means an individual (except scientific personnel, a sailing school instructor or a sailing student) engaged or employed in any capacity on board a vessel." This provision was enacted in 1983 as part of Congress' effort "to revise, consolidate and enact certain laws related to vessels and seaman as subtitle II of title 46, United States Code." H.R.Rep. No. 338, 98th Cong., 1st Sess. 1, *reprinted in* 1983 U.S.Code Cong. & Admin. News 924, 924. The definition of seaman is found at "Part G—Merchant Seaman Protection and Relief" and the legislative history indicates merely that "Section 10101 defines the terms master, seaman, and owner as they apply to merchant seamen's protection and relief." H.R.Rep. No. 338, 1983 Code Cong. & Admin. News at 1004. This definition, however, had its genesis in Act of Dec. 21, 1898. c. 28 §§ 23, 26, R.S. § 4612 (30 Stat. 762, 764) and was derived from Act of June 7, 1872, c. 322, § 65, 17 Stat. 277.

The court notes that this definition contains no requirement that a seaman have a permanent connection to a vessel.

time the Jones Act was passed. The Court, however, gave only limited guidance on the applicability of other common law requirements of seaman status, stating:

> The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. See *Maryland Casualty Co. v. Lawson,* 94 F.2d 190, 192 (CA5 1938) ("There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise"), cited approvingly in *Norton,* [*v. Warner Co.*] 321 U.S. [565] at 573, 64 S.Ct. [747] at 751 [88 L.Ed. 931 (1944)]. In this regard, we believe the requirement that an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission" captures well an important requirement of seaman status.

Id. at 817.

This court, therefore, must fill in the gap left by *McDermott* and reach the appropriate definition of seaman as applied to a river pilot who has no permanent connection to any one ship yet whose only duties place him at the most important post on the ship—the ship's helm. It does so, however, not without guidance. As explained above, the Court instructed lower courts to determine who is a seaman by examining general maritime law at the time Congress passed the Jones Act. *Id.* at 811.

In fact, the *McDermott* decision itself answers the question whether a river pilot was a seaman under general maritime law in 1920. Although endeavoring to determine the propriety of the "aid in navigation" test, the Court noted that pilots were considered seamen as early as 1832, when Justice Story wrote: "A cook and steward are seamen in the sense of the maritime law, although they have peculiar duties assigned them. *So a pilot,* a surgeon, a ship-carpenter, and a boatswain, are

deemed seamen, entitled to sue in admiralty." *Id., quoting United States v. Thompson,* 28 F.Cas. 102 (No. 16,492) (CCD Mass.1832) (emphasis supplied). The *McDermott* Court also observed that "[b]y the middle of the 19th century, the leading admiralty treatise noted the wide variety of those eligible for seamen's benefits: "Master, mates, sailors . . . pilots . . . women as well as men,—are mariners.' " *Id., quoting* E. Benedict, The American Admiralty § 278, p. 158 (1850).

This court's own research lends further support to this conclusion. In a series of cases concerning the states' power to regulate pilots and pilotage in ports and harbors, the Supreme Court wrote of this class of mariners that they were as much a part of the commercial marine as the hull of the ship and the helm by which it is guided . . . Pilots are a meritorious class, and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places and ready to perform the duties of their vocation.

Ex parte McNiel, 80 U.S. (13 Wall.) 236, 237-38, 20 L.Ed. 624 (1871). In *The China,* the Supreme Court noted that statutes requiring ships to hire pilots were beneficial "by providing a body of trained and skillful *seamen,* at all times ready for the service, holding out to them sufficient inducements . . . to pursue a business attended with so much of peril and hardship." 74 U.S. (7 Wall.) 53, 67, 19 L.Ed. 67 (1868). *See also The Alameda v. Neal,* 32 F. 331 (CC NDCal 1887) (object of pilotage fees "was to create a body of hardy and skillful seaman, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port"). In another case, the Supreme Court observed no significant difference between pilots who accompany a ship on a voyage and those local or port pilots "whose employment lasts but a few hours, and who have no connection with any vessel except to bring into or take it out of port. The term

pilots is equally applicable to [both] classes of persons. . . ." *Steamship Company v. Joliffe,* 69 U.S. (2 Wall.) 450, 461-62, 17 L.Ed. 805 (1864).

Lower courts that were faced with deciding whether pilots were protected under the general maritime law came to the same conclusion. Thus, in *The Mary Elizabeth,* the Circuit Court in the Southern District of Alabama, declared that "[a] pilot, being a person employed in the navigation of a vessel, is deemed a seaman, and his claim for wages is within the admiralty jurisdiction." 24 F. 397 (CC SDAla 1885). And in *Wilson v. The Ohio,* the court held that a pilot on a steamboat navigating the river Delaware is entitled to sue in admiralty for his wages. 30 F.Cas. 149, 150 (Case No. 17, 825) (E.D.Pa.1834). Finally, in yet another case from this Circuit, the court assumed that a pilot of a steam vessel, who is a licensed and sworn officer, is a seaman. *The Lud Keefer, Werling v. The Lud Keefer,* 51 F. 44 (3d Cir. 1892).

This court, as did the Supreme Court in *McDermott,* must also consider the importance of the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§ 901-950 in defining a Jones Act seaman. As the Court wrote:

> The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of the vessel" . . . [which] is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

McDermott, 111 S.Ct. at 813. Thus, the term "master or member of a crew," which is used in the LHWCA to exclude coverage, is identical to the term "seaman" for Jones Act purposes. According to the Court, both terms refer to "a sea-based maritime employee." *Id.* at 814.

[1] In 1927, shortly after its passage, the federal agency charged with enforcing the LHWCA issued a definitive ruling that a river pilot is a master or member of a crew and, therefore, excluded from LHWCA coverage. *Longshoremen's Act, Opinion #22,* 1928 AMC 263 (U.S. Employee's Comp.Comm.1927). The Commission, after examining various court pronouncements on the duties of pilots, concluded that "the pilot merely takes over for the time being some of the duties pertaining to navigation which devolve upon the master." *Id.* at 264. Significantly for this case, the Commission placed a river pilot within the class of master or member of the crew despite his temporary attachment to the vessel. This court must accord substantial weight to the Commission's conclusion, for the Supreme Court has held that its findings, if there is evidence to support them, are "conclusive." *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251, 257-58, 60 S.Ct. 544, 547-48, 84 L.Ed. 732 (1940). This court's own conclusion must be that a river pilot is a master or member of a crew and, therefore, is a Jones Act seaman.

Notably, Judge Brown reached the same conclusion in his powerful and persuasive dissent in *Bach v. Trident,* 920 F.2d at 327-33. Quoting from the ancient admiralty codes, pointing out the broad sweep of Supreme Court precedent and citing congressional activity in this area, Judge Brown recognized that the safe conduct of a vessel's mission could not be accomplished without the pilot; he is "indispensable." "The vessel may not operate without him/her. That pilot is in supreme command of the basic function of the vessel—to navigate in maritime commerce. That person is a seaman or he/she is nothing." *Id.* at 333. This court believes that the Supreme Court would also so find.

From this legal conclusion, the court must determine if this plaintiff is a seaman. As the Supreme Court noted in *McDermott,* this question is best characterized as a mixed question of law and fact. 111 S.Ct. at 818. Since this court sits as the factfinder in this nonjury

case, it must find the facts and apply the legal standard to those facts.

It is undisputed that Mr. Evans' entire career was spent as a river pilot and that on the morning of September 10, 1989, he was acting in that capacity aboard the M/V AL WATTYAH when the accident occurred. The ship's owner employed Mr. Evans through the services of the Pilot's Association, an organization of river pilots in the area. Therefore, he had that "employment-related connection" essential to determining seaman status. It is also undisputed that Mr. Evans' work on the M/V AL WATTYAH contributed to the function and mission of the ship. It can fairly be said that plaintiff's job required him to confront the perils and hazards of the sea that any other member of the ship's crew faces on a daily basis. Mr. Evans, therefore, is entitled to the protection of the Jones Act.

B. *Negligence and Causation*

Under the Jones Act, the employer, by its officers and crew, owes the plaintiff the obligation to exercise ordinary reasonable care for his safety. "A ship must provide a safe place to work to a seaman, or one who performs tasks traditionally performed by a ship's crew; that duty encompasses a reasonably safe means of boarding, and departing from the vessel, and failure to discharge it constitutes negligence." *Southard v. Independent Towing Co.*, 453 F.2d 1115, 1118 (3d Cir.1971). A seaman may also recover for his injuries caused by any defect or insufficiency in equipment due to the ship owner's negligence. 46 U.S.C. § 688, incorporating by reference 45 U.S.C. § 51 (the Federal Employers' Liability Act (FELA)). The Supreme Court has instructed the lower courts to interpret the term liberally "so as to include all the meanings given to it in the light of the peculiar hazards of the seafaring profession." Norris, The Law of Seaman § 690, p. 374-75 (1970); *see also Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1352 (5th

Cir.1988), *cert. denied,* 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 ("[e]vidence of the 'slightest' negligence is sufficient").

[2] If the duty owed to the seaman is breached, plaintiff must show only that the breach " 'played any part, even the slightest, in producing the injury or death for which damages are sought.' " *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (1957) (Jones Act case), *quoting Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) (FELA case); *Smith v. Trans-World Drilling Co.,* 772 F.2d 157, 162 (5th Cir.1985) ("Jones Act negligence is a legally sufficient cause of injury if it played any part, no matter how small, in bringing about the injury"); *Southard,* 453 F.2d at 1118. The Fifth Circuit has described this standard of causation as "featherweight." *Smith, supra;* Gilmore and Black, The Law of Admiralty (2d ed.) at 377.

The liberal standards of negligence and legal causation fashioned by the courts in Jones Act and FELA cases are equally applicable where testimony from medical experts fails to establish anything like a definitive answer on the question of what caused plaintiff's injury. In the leading case on this issue, *Sentilles v. Inter-Caribbean Corp.,* 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959), the Supreme Court examined the case of a seaman suing under the Jones Act. The seaman had been thrown some distance when the ship pitched in heavy seas. Shortly after the accident, he became very ill and was treated for a serious case of tuberculosis. At trial, plaintiff sought to prove that the accident activated or aggravated a previously latent tubercular condition, though no medical expert could say that the accident in fact caused plaintiff's condition. The Supreme Court affirmed the jury's finding of liability, stating:

> The Jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact

> caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration.

Id. at 109-10, 80 S.Ct. at 175-76 (footnote omitted). The Court also noted the general reluctance among experts to state that trauma was the cause of a disease. *Id.* at 109 n. 2, 80 S.Ct.; at 175 n. 2

The Third Circuit has just recently reiterated that the concept of causation in FELA, and thus Jones Act, cases is "broadly interpreted." *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 268 (3d Cir.1991). In reversing the lower court's grant of summary judgment in favor of the employer, the Third Circuit compared its holding in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir.1990), *cert. denied, General Electric Co. v. Knight*, __ U.S. __, 111 S.Ct. 1584, 113 L.Ed.2d 649 (1991), that medical experts must state their opinions with "reasonable medical certainty," to the more liberal view expressed in *Sentilles*. *Hines* held that "a medical expert can testify that there was more than one potential cause of a plaintiff's condition." *Id.* The court then reaffirmed the Supreme Court's holding in *Sentilles* allowing the jury to draw causal inferences based on varying and inconclusive medical testimony.

[3] Looking at all the evidence presented at trial, the court finds that defendant was negligent in failing to ensure that the accommodation ladder was reasonably

safe for pilot Evan's egress from the ship. Plaintiff's expert in marine surveying, William J. Campbell, stated that it is the responsibility of the officer on the ship to keep the accommodation ladder rigged properly. A properly rigged ladder would have a pin with a lanyard attached, which would be inserted at the lower platform in such a way as to lock it into position. March 4 Transcript at 69-73. The seaman's earlier fall from the platform followed by plaintiff's fall made it apparent to this court's satisfaction that the pin was not inserted properly at either point in time. In addition, the handrail on the outboard side of the ladder was defective in that a stanchion was missing, causing it to collapse when plaintiff put his weight on it. Another example of defendant's negligence is the officer's failure to respond to plaintiff's inquiry about the ladder and to investigate the situation further. It was these acts of defendants negligence that caused Mr. Evans to fall and hit the launch.

[4] As to plaintiff's orthopedic injuries, the court finds that defendant's negligent failure to rig properly the accommodation ladder caused Mr. Evans' immediate injuries: his fractured nose and bruised ribs and coccyx. As to plaintiff's neurological injuries, the court acknowledges that it is a close and difficult question. If this were not a Jones Act case with its attendant "featherweight" standard for proving causation, then this court would find that defendant's negligence did not proximately cause or aggravate plaintiff's neurological injuries. However, this court is bound to apply the law as it now stands.

As an initial matter, the court finds that plaintiff's fall from the ladder did not cause Mr. Evans' motor neuron disease. Testimony from both Dr. Bhatt and Dr. Cook revealed that plaintiff had complained of some tiredness in his legs and balance problems before the accident. The real question is whether the fall aggravated or accelerated a pre-existing but almost completely latent motor neuron dysfunction. Testimony from the medical experts, both fully qualified in the field of

neurology, indicated that there are several potential causes of the type of motor neuron disease from which Mr. Evans suffers. Plaintiff's expert, Dr. Cook, opined that the trauma of the fall "possibly" caused the aggravation of plaintiff's condition, but the etiology of the disease is still not known for certain. Dr. Duvoisin, defendant's expert, dismissed trauma as a possible cause though he did acknowledge that there are researchers in this field who claim that trauma may cause motor neuron disease. From this evidence, the court is left in a grey zone between "maybe" and "probably not." In that situation, the court is inclined to lean more heavily than it would otherwise on the circumstantial evidence in the case as well as general common sense.

The circumstantial evidence was sufficiently probative that the court feels it is reasonable to infer that the manner in which plaintiff fell from the ladder aggravated his neurological symptomology. For example, before the accident, plaintiff was not experiencing any great difficulty in his neurological functions and received no complaints of his performance on the job; one witness observed absolutely no indications of any problem as recently as seven or eight weeks before the fall. When plaintiff fell from the ladder, the full weight of plaintiff's body struck the gunnel of the launch at the base of his spine; in addition, plaintiff struck his face on the ladder with such force as to break his nose. Mr. Evans was obviously traumatized by the event — the pilot of the launch said he looked visibly shaken and pale. Significantly, plaintiff and his wife noticed a distinct change in his ability to speak and walk just one or two days after the accident. Numerous complaints about plaintiff's ability to speak and walk on the job just six weeks after the accident are telling evidence that plaintiff's condition deteriorated substantially in a very short span of time. From all this evidence, plus the fact that medical science has not reached a point where it can rule trauma out as a possible cause of motor neuron

disease, the court concludes that defendant's negligence played a part in aggravating plaintiff's neurological condition.

C. *Damages*

The general rule for measuring damages due to the tortious conduct by a seaman's employer was set forth by this Circuit in *Downie v. United States Line Co.*, 359 F.2d 344, 347-48 (3d Cir.) (in banc), *cert. denied*, 385 U.S. 897, 87 S.Ct. 201, 17 L.Ed.2d 130 (1966), and reiterated in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir.1982). There, the court said the plaintiff is entitled to an award of damages commensurate with the nature and extent of his injuries.

> He is entitled to reimbursement for his loss of earnings, past and prospective; for any impairment of his earning capacity; for medical expenses incurred and to be incurred; and for any other economic loss he may have sustained or is likely to sustain. He is also entitled to redress for his physical injury, including the effects thereof, such as pain, suffering, mental anguish; discomfort, and inconvenience. If the injuries are permanent . . . he may recover . . . his probable loss of future earnings. . . . The injured worker is also entitled to compensation, again based on life expectancy at the time of injury, for the physical and mental effects of the injury on his ability to engage those activities which normally contribute to the enjoyment of life. . . .

Pfeifer, 678 F.2d at 460.

[5] In cases like this one, in which an employer's negligence aggravated a pre-existing condition, courts have held that the defendant must compensate plaintiff only for the aggravation itself and not for the pre-existing condition. "The court has only allowed damages for the increased and augmented suffering and disability which was the proximate result of defendant's act." *Scarberry v. Ohio River Co.*, 217 F.Supp. 189, 193 (S.D.W.Va.1963); *Thompson v. Coastal Oil Co.*, 119

F.Supp. 838, 845 (D.N.J.1954) (symptoms of brain damage considered only to the extent that unseaworthy condition aggravated them), *rev'd on other gds.*, 221 F.2d 559 (3d Cir.1955), *rev'd*, 352 U.S. 862, 77 S.Ct. 90, 1 L.Ed.2d 73 (1956); Benedict on Admiralty § 32 at 3-284, 3-285 (1989). *Contra Milos v. Sea-Land Serv., Inc.*, 478 F.Supp 1019 (S.D.N.Y.1979); *Pedersen v. Diesel Tankers, Ira S. Bushey, Inc.*, 280 F.Supp. 421 (S.D.N.Y.1967). Where plaintiff would have experienced the symptoms of his pre-existing condition at some time in the future even if he had not fallen, he can only recover that portion of his damages caused by the aggravating event, and not all damages associated with the pre-existing condition.

[6] After a close review of the record at trial, the court is unable to make an award of damages that would not be completely speculative. The evidence on medical costs, for example, other than for plaintiff's orthopedic injuries, posited recovery of the entire amount necessary until Mr. Evan's death—approximately four years of acute therapy, at-home nursing care and home modifications calculated at over $1.8 million. Another problem is that plaintiff's medical experts did not say precisely how his condition was aggravated by the fall, making it impossible for the court to exercise its own judgment about the appropriate measure of the aggravation. Specifically, the court would want to know approximately when the disease would have rendered plaintiff unable to function normally but for the fall.

So that it may exercise its function properly, the court has determined that it is necessary to open the record so that evidence may be heard on how to measure damages for the aggravation of Mr. Evans' condition. The court is not interested in a repeat of what has already been offered in evidence. Rather, it expects a sufficiently detailed estimate of the increase in plaintiff's suffering, disability and wage loss due to the aggravation of his disease. The parties are hereby directed to submit briefs on this issue, based on admissable evidence.

Submissions shall be delivered to chambers no later than Friday, August 23. If settlement does not occur, and if a hearing is necessary, the court will schedule one accordingly.

ORDER

This admiralty suit having come before the court on a bench trial conducted on March 4-7, 1991; and

The court having considered all the submissions of the parties and the evidence introduced at trial, and for the reasons set forth in its Findings of Facts and Conclusions of Law entered this same date; and

For good cause shown;

IT IS this 30th day of July, 1991 hereby

ORDERED that defendant United Arab Shipping Company is adjudged liable for the negligent conduct of its employees aboard the M/V AL WATTYAH on September 10, 1989 that caused plaintiff's injuries. It is further

ORDERED that the court shall open the record to consider evidence on how to measure the damages for the aggravation of plaintiff's pre-existing neurological condition. Briefs shall be filed with the court no later than Friday, August 23 in accordance with the court's opinion of this date. A hearing, if necessary, will be scheduled accordingly.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5300, 92-5301, 92-5534 & 92-5535

WILLIAM W. EVANS,
Appellant at Nos. 92-5300 & 92-5534
v.
UNITED ARAB SHIPPING COMPANY S.A.G.;
M/V AL WATTYAH, her engines, boilers, equipment, etc.
UNITED ARAB SHIPPING COMPANY S.A.G.,
Appellant at Nos. 92-5301 & 92-5535

Appeal from the United States District Court
for the District of New Jersey
(D.C. Divil Docket No. 89-05246)

Present: Hutchinson, Nygaard and Seitz, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on February 22, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 4, 1992 as amended by order entered August 26, 1992, be, and the same is hereby affirmed with respect to the award to William W. Evans of damages only for his orthopedic injury, lost earning, and pain and suffering resulting therefrom. Costs taxed against appellants in each appeal. All of the above in accordance with the opinion of this Court.

ATTEST:

P. Douglas Sisk

Clerk

Dated August 13, 1993

Costs taxed in favor of United Arab Shipping Company as follows:

TOTAL COSTS $352.46

Certified as a true copy and issued in lieu of a formal mandate on September 30, 1993.

Teste: P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5300, 92-5301, 92-5534 & 92-5535

WILLIAM W. EVANS,
Appellant at Nos. 92-5300 & 92-5534

v.

UNITED ARAB SHIPPING COMPANY S.A.G.;
M/V AL WATTYAH, her engines, boilers, equipment, etc.

UNITED ARAB SHIPPING COMPANY S.A.G.,
Appellant at Nos. 92-5301 & 92-5535

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Docket No. 89-05246)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and SETIZ,* *Circuit Judges*

The petition for rehearing filed by appellant William W. Evans in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

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* Hon. Collins J. Seitz was limited to voting for panel rehearing.

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ WILLIAM D. HUTCHINSON
Circuit Judge

DATED: September 22, 1993

Jones Act
46 U.S.C. app. § 688(a)

§ 688. Recovery for injury to or death of seaman

(a) **Application of railway employee statutes; jurisdiction.** Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of peronal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Longshore and Harbor Workers' Compensation Act
33 U.S.C. §§ 902, 903, 905

§ 902. Definitions

When used in this Act—

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

(5) The term "carrier" means any person or fund authorized under section 32 [33 USCS § 932] to insure under this Act and includes selfinsurers.

(6) The term "commission [Secretary]" means the United States Employees' Compensation Commission [Secretary of Labor].

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from other than the employer.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child", "grandchild", "brother", and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) [(18)] of this section.

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) The term "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death;

or living apart for justifiable cause or by reason of his or her desertion at such time.

(17) The terms "adoption" or "adopted" mean legal adoption prior to the time of the injury.

(18) The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is—

(A) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof.

(B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body.

(C) a school or college or university not so accredited but whose credits are accepted on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the Secretary.

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his

control from pursuing his education. A child shall not be deemed to be a student under this Act during a period of service in the Armed Forces of the United States.

(19) The term "national average weekly wage" means the national average weekly earning of production or nonsupervisory workers on private nonagricultural payrolls.

(20) The term "Board" shall mean the Benefits Review Board.

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

(22) The singular includes the plural and the masculine includes the feminine and neuter.

(Mar. 4, 1927, ch 509, § 2, 44 Stat. 1424; June 25, 1938, ch 685. § 1, 52 Stat. 1164; Oct. 27, 1972, P.L. 92-576, §§ 2(a)(b) 3, 5(b) 15(c), 18(b), 20(c), 86 Stat. 1251, 1262.)

§ 903. Coverage

(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(Mar. 4, 1927, ch 509. § 3, 44 Stat. 1426; Oct. 27, 1972, P. L. 92-576, §§ 2(c), 21, 86 Stat. 1251, 1265.)

§ 905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 4 [33 USCS § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act [33 USCS § 933], and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person

was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.
(Mar. 4, 1927, ch 509, § 5, 44 Stat. 1426; Oct. 27, 1972, P. L. 92-576, § 18(a), 86 Stat. 1263.)

DELAWARE CODE Ann. tit. 23, § 121 (1987)

§ 121. Receipt of pilots by vessels; penalties for refusal; jurisdiction.

Every foreign ship or vessel and every ship or vessel engaged in foreign commerce or trade arriving from or bound to any foreign port or place, passing in or out of the entrance to Delaware Bay, and passing between the points of land known as the Capes of the Delaware, shall be obliged to receive a pilot. For the purposes of this section, the entrance to Delaware Bay is defined as that body of water bounded by the New Jersey and Delaware coasts as they border the Atlantic Ocean and included within an arc of 20-mile radius as measured from the top of the lighthouse known as "Harbor of Refuge Light." If the master of any ships or vessels, after she is spoken or a pilot offered, refuses or neglects to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage of such ship or vessel to be recovered by a suit in the courts of this State or before a justice of the

peace, or such pilot may pursue his remedy therefor by a libel in admiralty in any United States court either in personam or by proceeding in rem, to enforce the lien given him on such ship or vessel, as such pilot may see fit and proper to do. (16 Del. Laws, c. 449, § 5; 17 Del. Laws. c. 145, § 1; 18 Del. Laws, c. 619, § 2; Code 1915, § 957; Code 1935, § 1069; 23 Del. C. 1953, § 121; 62 Del. Laws, c. 105, § 7.)

No. 93-1021

(2)

Supreme Court, U.S.
FILED
JAN 20 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM W. EVANS,

Petitioner,

—v.—

UNITED ARAB SHIPPING COMPANY S.A.G.;
M/V AL WATTYAH, her engines, boilers, etc., in rem,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

CARY ROBERT WIENER*
LESLIE ANN MYROW
SABURABI N. IBRAHIM
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**Counsel of Record*

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QUESTIONS PRESENTED FOR REVIEW

Respondent, United Arab Shipping S.A.G., disagrees with the statement of the Questions Presented For Review by petitioner. The questions presented for consideration are:

1. Whether the United States Court of Appeals for the Third Circuit correctly determined that petitioner, a compulsory pilot, is not a Jones Act seaman and is not entitled to state a claim as such against respondent under the Jones Act, 46 U.S.C. app. sec. 688?

2. Whether the employment related connection to a vessel in navigation requirement necessary to obtain Jones Act seaman status is a separate and distinct requirement from the employer-employee relationship necessary to invoke the Jones Act?

3. Whether compulsory pilots on United States navigable waters must be either Jones Act seamen or longshore/harbor workers as opposed to seamen entitled to bring a cause of action under the general maritime law?

LIST OF INTERESTED PERSONS AND RULE 29.1 LIST

The parties to the proceeding below were petitioner/plaintiff, William W. Evans, and respondent/defendant, United Arab Shipping S.A.G., the owner of the M/V AL WATTYAH. Although petitioner named the vessel, the M/V AL WATTYAH, as a defendant, petitioner never served the master of the vessel. Thus, the vessel was not a party in the courts below and is not a party before this Court.

Pursuant to this Court's Rule 29.1, respondent, United Arab Shipping S.A.G. certifies that it is one hundred percent owned collectively by the governments of the United Arab Emirates, Bahrain, Saudi Arabia, Qatar and Kuwait. United Arab Shipping has no subsidiaries that are not wholly owned.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1021

WILLIAM W. EVANS,

Petitioner,

—v.—

UNITED ARAB SHIPPING COMPANY S.A.G.;
M/V AL WATTYAH, her engines, boilers, etc., in rem,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Respondent, United Arab Shipping Company S.A.G., submits that there is no basis for granting a writ of certiorari in this case. The United States Court of Appeals for the Third Circuit applied a test that is consistent with the tests applied by all other United States Courts of Appeals for determining eligibility to state a cause of action under the Jones Act, 46 U.S.C. app. sec. 688, and correctly found that petitioner was not entitled to bring a Jones Act claim against respondent.

Furthermore, this Court in *McDermott International v. Wilander*, 498 U.S. 337 (1991), reviewed and approved the traditional Jones Act status test as articulated by the Fifth Circuit in *Offshore v. Robison*, 266 F.2d 769 (5th Cir. 1988). Post-McDermott decisions rely on the continued vitality of

the *Robison* test. Thus, this case does not justify issuance of a writ of certiorari.

STATEMENT OF THE CASE

Petitioner William W. Evans, a compulsory river pilot, brought this action against the shipowner, United Arab Shipping Company, claiming damages under the general maritime law for orthopedic and neurological injuries. Petitioner did not plead a Jones Act claim in his complaint, but raised it for the first time at the bench trial in the District Court.

Evans was engaged as a compulsory ship pilot by United Arab Shipping Company through the agency of the Delaware Bay & River Pilots' Association. Evans was a self-employed member of the Pilots' Association. He filed income tax returns for the years 1986-1989 as a self-employed taxpayer and not as an employee of any shipowner to whom he provided services. These tax returns were prepared by the same counsel representing him in this petition. Petitioner's sole engagement with respondent was on this subject voyage on September 10, 1989, lasting not more than six hours.

Evans fell while disembarking from the vessel and suffered only a fractured nose. He recovered sufficiently to return to work about one week later and continued piloting ships until he stopped working two months later.

The District Court for the District of New Jersey found that United Arab Shipping Company had aggravated Evans' pre-existing motor neuron disease, but reached this finding only because a Jones Act seaman's "featherweight" burden of proof as to causation applied. Had Evans been required to provide more than a "featherweight" burden of proof, the court itself said it would have found no aggravation. (Petitioner's A-46). The court placed the burden on Evans to segregate damages due to his pre-existing illness. The district court held that Evans failed to produce sufficient evidence to

establish the nature of his motor neuron disease and that he also failed to show the extent to which respondent's negligence may have aggravated his pre-existing neurological illness. The court therefore awarded Evans damages only in connection with his orthopedic injuries. Evans appealed the district court's assignment of the burden of proof on the aggravation issue and United Arab Shipping Company cross-appealed the district court's determination that petitioner was entitled to state a cause of action under the Jones Act.

On August 13, 1993, the U.S. Court of Appeals for the Third Circuit, using a test for Jones Act status consistent with the tests of all other circuits on the same matter, reversed the district court's finding that petitioner was entitled to the protection of the Jones Act. (Petitioner's A-3) Evans submitted a petition for rehearing, which was denied by the same panel and en banc by the Court of Appeals on September 22, 1993. (Petitioner's A-53).

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS CONSISTENT WITH ALL OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER

The potential Jones Act claimant bears the burden to prove each and every element set out hereunder:

1. Claimant is an employee of the defendant; *and*
2. Claimant has a "permanent or substantial" connection with the defendant's vessel or fleet of vessels; *and*
3. Claimant's service aided in or contributed to the functioning of the vessel or accomplishment of its mission.

The first and second elements were not proven in this case, and therefore Evans failed to establish Jones Act status.

The United States Court of Appeals for the Third Circuit *reversed* the District Court's finding that pilot Evans was entitled to bring a Jones Act claim against respondent. The Third Circuit, reviewing the *first element* of the test above, found that "a compulsory river pilot such as Evans is not an employee of the vessel he pilots." (See Petition A-13) The Third Circuit chose not to decide the *second element* of the above test because Evans did not satisfy even the first element.

Although petitioner argues that the status of a pilot "has been left in a state of confusion by the split among the Circuits," there is in fact, no confusion, and all the Circuit Courts which have heard this issue have found that an independent pilot is *not* entitled to Jones Act remedies.

Petitioner has read with tunnel vision the various pilot and Jones Act status cases. Although the litmus test for Jones Act status is three-pronged, courts have examined only the prong(s) at issue before the courts. The fact that a case examines less than all the prongs, does not imply that the other prongs are not essential ingredients to the test. For example, in *Campbell v. Offshore Pipeline, Inc.*, No. 92-1189, 1993 U.S. Dist. LEXIS 10966 (E.D. La. July 27, 1993), once it was determined that the plaintiff failed to prove "permanent or substantial connection with the defendant's vessel or fleet of vessels," the Court found it unnecessary to reach the question of whether the requisite employer-employee relationship existed. By further illustration, it is not contested in the case before this Court that petitioner satisfied the third element (claimant's service aided in or contributed to the functioning of the vessel or accomplishment of its mission.) However, this does not suggest that the third element is not as important to the Jones Act test as the other two elements. Nor does it suggest that this third element is not required in order to satisfy the Jones Act test.

A prerequisite to a Jones Act claim is an employer-employee relationship and only an employer can have Jones Act liability. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, *reh'g denied*, 338 U.S. 389 (1949); *see Campbell v. Offshore Pipeline, Inc.*, No. 92-1189, 1993 U.S. Dist. LEXIS 10966 (E.D. La. July 27, 1993). In *Haskins v. Point Towing Co.*, 421 F.2d 532 (3d Cir.), *cert. denied*, 400 U.S. 834 (1970), the Third Circuit held that the primary requisite to any recovery under the Jones Act is the establishment by the seaman of an employer-employee relationship with the defendant. If this requirement is not met, it is not necessary for the courts to review the other elements of the Jones Act test.

The petitioner suggests that there is confusion where there is none. Authorities (including the 1st, 2nd, 3rd, 4th, 5th and 9th Circuits) which confirm that claimant's **employer-employee** relationship with defendant is essential to a Jones Act action are legion. Suffice here for us to cite these other cases in summary fashion:

PILOT CASES—*Bach v. Trident Shipping*, 708 F. Supp. 772, 773, (E.D. La. 1988) *aff'd*, 920 F.2d 322 (5th Cir.), *vacated*, 499 U.S. __, 111 S.Ct. 2253, *reaffirmed on remand*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 504 U.S. __, 112 S. Ct. 1996 (1992); *Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1265 (1992); *Ray v. Great Lakes Towing Co.*, No. 92 Civ. 7034 (N.D. Ohio Feb. 25, 1992); *Stoller v. Evergreen Int'l (U.S.A.) Corp.*, No. C92-0466 FMS (N.D. Cal. Sept. 1, 1992);

APPEAL COURT CASES—*Matute v. Lloyd Bermuda Lines*, 931 F.2d 231 (3d Cir. 1991); *Trentacosta v. Frontier Pacific Aircraft Industries, Inc.*, 813 F.2d 1553 (9th Cir. 1987); *Cerqueira v. Cerqueira*, 828 F.2d 863 (1st Cir. 1987); *Dracos v. Hellenic Lines Ltd.*, 705 F.2d 1392 (4th Cir. 1983); *Volyrakis v. M/V Isabelle*, 668 F.2d 863 (5th Cir. 1982); *Rohde v. Southeastern Drilling Co. Inc. et al.*, 667 F.2d 1215 (5th Cir. 1982); *Baker v. Raymond Int'l*, 656 F.2d 173, 177 (5th

Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); *Wheatley v. Gladden*, 660 F.2d 1024 (4th Cir. 1981); *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447 (5th Cir. 1980); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Klarman v. Santini*, 503 F.2d 29 (2d Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Viger v. Geophysical Services, Inc.*, 476 F.2d 1288 (5th Cir. 1973); *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973);

DISTRICT COURT CASES—*Tate v. Zapata Gulf Marine Construction et al.*, No. 93-5, 1993 U.S. Dist. LEXIS 10980 (E.D. La. August 2, 1993); *McAleer v. Smith*, 818 F. Supp. 486 (D.R.I. 1993); *Kline v. Maritans CP, Inc.*, 791 F. Supp. 455 (D. Del. 1992); *Hodge v. Ocean Quest Int'l. Ltd.*, No. 90-4685, 1992 U.S. Dist. LEXIS 9523 (E.D. La. 1992) ("Under the Jones Act, an employee/employer relationship must exist between the plaintiff and the defendant at the time of the accident."); *Gazis v. John S. Latsis (USA) Inc.*, 739 F. Supp. 979 (S.D.N.Y. 1990); *Eckenrode v. Delton Demolition*, Nos. 86-4136, 86-4403, 1987 U.S. Dist. LEXIS (E.D. La. 1987);

STATE COURT CASES APPLYING FEDERAL MARITIME LAW—*Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991); *Machado v. George R. Brown Partnership, John Marceaux, and McMahan Construction, Inc.*, No. C14-92-00933-CV, 1993 Tex. App. LEXIS 1855 (Tex. Ct. App. July 1, 1993).[1]

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[1] Some courts include the employer-employee relationship as part of the three prong test for Jones Act seaman status. Other courts use a two-pronged test for Jones Act seaman status and then include the employer-employee relationship as a third element which is necessary to bring a Jones Act claim. No matter how the three prongs are grouped, *all* courts ultimately require *all* three prongs to be satisfied before a Jones Act claim may be brought. *See also Campbell v. Offshore Pipeline, Inc.*, No. 92-1189, U.S. Dist. LEXIS 10966, 12 (E.D. La. July 27, 1993). In addition, "many of the cases use the term 'shipowner' interchangeably with the term 'employer', but this is done only where the shipowner is the employer." *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 171 (2d Cir. 1973).

Far from seeking to secure or maintain uniformity between the Circuit Courts of Appeals, petitioner's attempt to dispense with the requirement for an employer-employee relationship in a Jones Act action calls for a complete reversal of established federal maritime law on this issue.

This Court's decision in *McDermott Int'l v. Wilander*, 498 U.S. 337 (1991), has already acknowledged that the underpinning of a Jones Act remedy is an employer-employee relationship between claimant and defendant. In *McDermott*, plaintiff was an "employee" of the shipowner. In *McDermott*, the discussion revolved around the nature of the employees' duty, i.e., the type of job. When this Court in *McDermott* discussed an "employment-related connection" between plaintiff and vessel, it used the term "employ" to mean "to use" someone as in "he was employed in advancing the mission of the vessel" rather than to mean employment, as in being an employee of the company or vessel:

> The key to seaman status is *employment-related connection* to a vessel in navigation. We are *not called upon* here *to define this connection in all details*, but we hold that *a necessary element of the connection* is that a seaman performs the work of a vessel . . . In this regard, we believe the requirement that an *employee's* duties must "contribute to the function of the vessel or to the accomplishment of its mission" captures well *an important requirement of seaman status* . . . . (emphasis supplied).

Id. at 355.

Similarly, in *Southwest Marine Inc. v. Gizoni*, __ U.S. __, 112 S. Ct. 486 (1991), this Court implicitly endorsed the employer-employee requirement in a Jones Act claim:

> "The 9th Circuit also found questions of fact to remain concerning whether Gizoni aided in the navigation of these platforms. After *McDermott Int'l v. Wilander*, however, only "employment-related connection to a ves-

> sel in navigation" is required. To be a seaman, the ***employee*** need not aid in navigation." (Citation omitted; emphasis supplied).

Id. at 494.

Petitioner states in his petition at page 9, that in *Ringering v. Compania Maritima De-La-Mancha*, 670 F. Supp 301 (D. Or. 1987), *aff'd mem.*, 848 F.2d 243 (9th Cir. 1988), the Ninth Circuit "affirmed a district court decision which had squarely held that river pilots were entitled to the protection of both the Jones Act and the warranty of seaworthiness." This is clearly a misstatement of the case. Prior to trial in the district court, plaintiff Ringering "***withdrew the Jones Act claims***". *Ringering*, 670 F. Supp. at 302 (emphasis added). In fact, similar to petitioner who was an independent contractor, Ringering was self-incorporated and employed by Merlin Ringering, Inc. Ringering recovered under theories of seaworthiness and negligence under the general maritime law, ***not under the Jones Act*** with its attendant special standard for burden of proof. The *Ringering* district court, using the traditional standard for negligence, stated: "To establish proximate cause, plaintiff must show that 'the act or omission played a *substantial* part in bringing about or actually causing the injury; and that the injury was either the direct result or reasonable probable consequence of the act or omission.' " *Ringering*, 670 F. Supp. at 305. This burden of proof is not the test utilized in a Jones Act case.

The employer-employee relation is essential because the Jones Act, a statute created to serve as a type of workers' compensation, is designed to protect certain seamen and to facilitate their recovery of damages based on negligence against their employer for injuries suffered in the course of their employment. It is the equivalent of the Federal Employers' Liability Act (FELA) which was created for railroad employees. The Jones Act remedy is only available to a seaman who is a master or member of the crew of a vessel. *Braen*

v. Pfeifer Oil Transp. Co., 361 U.S. 129 (1960). An injured party seeking to recover under the Jones Act must be a member of the vessel. A non-employee shares the same status as a non-seaman transitory maritime employee: they both fall outside the protected class of Jones Act seaman. For *non*-Jones Act seamen who are injured aboard the vessel in the course of their assignment, a cause of action may lie against the shipowner for negligence (but *not* Jones Act negligence) under the general maritime law. *See McMahon, Jr. v. M/V TOMIS SEA, Hong Fat Shipping and Yick Fung Shipping & Enterprises Company*, No. 92-2368 C/W 92-3314, 1993 U.S. Dist. LEXIS 7894 (E.D. La. May 28, 1993). *But no Jones Act remedy, with its "featherweight" burden of proof, is available* to the claimant against a shipowner who is not claimant's employer.

In all cases where members of pilots' associations have sought Jones Act remedies, their claims have been *consistently rejected* because of their independent contractor/non-employee status. They fail the litmus test of proving an "employment relationship" with a defendant shipowner.

The district court in *Bach v. Trident Shipping*, 708 F. Supp. 772, 773, *aff'd*, 920 F.2d 322 (5th Cir.), *vacated*, 499 U.S. __, 111 S. Ct. 2253, *reaffirmed on remand*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 504 U.S. __, 112 S. Ct. 1996 (1992), analyzed the plaintiff river pilot's alleged employment-relationship with the defendant shipowner and found none existed. (On appeal, Bach did not place in issue the employer-employee relationship.)

The district court in **Bach** *found that the pilot, a member of a Pilots' Association, was an independent contractor. Neither shipowner's right to refuse the pilot's services nor characterization of the pilot fee as "wages" was proof of an employment relationship; they are consistent with the pilot's status as an independent contractor.*

The district court in *Bach* distinguished cases where pilots were found to be Jones Act seamen on the ground that such

pilots were permanent, salaried employees. *See Magnolia Towing v. Pace*, 378 F.2d 12 (5th Cir. 1967); *Daughdrill v. Diamond M. Drilling Co.*, 447 F.2d 781 (5th Cir. 1971).

In *Harwood v. Partredereit AF*, 944 F.2d 1187, 1189 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1265 (1992), the court found that a pilot who was a member and part owner of the Virginia Pilots' Association, *functioned as an independent contractor*, had no permanent or substantial connection to the vessel and consequently failed the Jones Act seaman status test. *See also Meyers v. M/V "EUGENIO C,"* 919 F.2d 1070 (5th Cir. 1990); *Ray v. Great Lakes Towing Co.*, Docket No. 3: 92 Civ. 7034 (N.D. Ohio Feb. 25, 1992); *Clark v. Solomon Navigation Ltd.*, 631 F. Supp. 1275 (S.D.N.Y. 1986) (pilot is not Jones Act seaman).

II. *McDERMOTT INTERNATIONAL, INC. V. WILANDER* MODIFIED ONLY THE THIRD ELEMENT OF THE JONES ACT STATUS TEST AND HAS NOT LEAD TO ANY CONFUSION IN THE COURTS

A review of the Circuit Courts shows that the finding by the Third Circuit, that an independent pilot such as petitioner is not entitled to Jones Act remedies, is consistent with the tests applied in the **First, Third, Fourth, Fifth, Sixth, Seventh, Eighth** and **Ninth** Circuits and that all Circuits restate the traditional common law requirement, without any substantial variations. *No Circuit* or *District Court* (except in this case) states otherwise.

The **Fifth Circuit** test articulated in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) is perhaps the best known. It essentially requires the *employee* to prove: (1) he was *assigned permanently to a vessel or performed a substantial part of his work on the vessel*; and (2) he contributed to the function of the vessel or the accomplishment of its mission.

The **First Circuit** test in *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941) was the template for the Third Circuit test. The First Circuit requires: (1) that the ship

was in navigation; (2) that the *employee had a more or less permanent connection with the ship*; and (3) that the employee was aboard primarily to aid in navigation.[2]

The **Fourth Circuit** test, restated in *Stephenson v. McLean Contracting Co.*, 863 F.2d 340, 341 (1988), *cert. denied*, 490 U.S. 1085 (1989) requires that: (1) *worker was more or less permanently attached to the vessel or fleet of related vessels*; (2) worker's duties served naturally and primarily as an aid to navigation (see footnote 2 below); and (3) vessel was in navigation. *See also Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1265 (1992) (river pilot fails Fourth Circuit status test).

The **Sixth Circuit** test restated in *Searcy v. E.T. Slider, Inc.*, 679 F.2d 614, 616 (6th Cir.1982) (and recently applied in *Boyd v. Ford Motor Co.*, 948 F.2d 283 (6th Cir. 1991)) requires: (1) vessel was in navigation; (2) *employee* had a *more or less permanent connection with the vessel*; and (3) *employee* was on board the vessel primarily in aid of navigation (see footnote 2 below). *See also Johnson v. John F. Beasley*, 742 F.2d 1054, 1061 (**7th Cir.** 1984); *Wilson v. Jotori Dredging, Inc.*, 999 F.2d 370, 371 (**8th Cir.** 1993); *Southwest Marine v. Gizoni*, __ U.S. __, 112 S. Ct. 486 (1991) (appeal from the **9th Circuit**) which imposed similar requirements.

An essential and unvarying element in the tests adopted by these various Circuits is proof of the employee's connection to the vessel, which must be either *permanent or substantial*.

The district court below was misled by petitioner's misinterpretation of *McDermott International v. Wilander*, 498 U.S. 337 (1991) that:

> [T]he Supreme Court's recent decision in *McDermott* leads to the inevitable conclusion that the 'permanent

---

[2] This prong of the test was subsequently modified by the *McDermott* decision.

> attachment' element of seaman status is no longer required; it is enough that plaintiff was employed to assist in the performance of the vessel's functions.
>
> (Petitioner A-37)

Petitioner continues this distorted view of *McDermott* when petitioner states "[T]his made it clear that so long as a claimant had an 'employment-related connection to a vessel in navigation', he or she was entitled to the Jones Act remedy." (Petitioner page 10.)

It is patently clear from all the post-*McDermott* authorities that, far from diminishing the traditional Jones Act status tests as articulated by the Fifth Circuit in *Robison*, *McDermott* reinforced the continuing validity of the test. Proof of petitioner's permanent or substantial attachment to the vessel or fleet of vessels is still an enduring requirement in order to establish Jones Act seaman status

In *Southwest Marine v. Gizoni*, __ U.S. __, 112 S. Ct. 486 (1991), this Court confirmed that the vessel-connection test of *Robison* was not jettisoned by *McDermott*. This Court agreed with two prongs of the three prongs required by the **Ninth Circuit** for seaman status. These prongs were: (1) whether the structures on which plaintiff worked were vessels in navigation; (2) whether *plaintiff's relationship with the structures was permanent. Id.* at 490. But as to the third prong, (3) whether plaintiff aided in the navigation, this Court noted that, "After [*McDermott*], however, only 'employment-related connection to a vessel in navigation' is required." *Id.* at 494 n.6.

In *Ducote v. Keeler*, 953 F.2d 1000, 1002 n. 2 (5th Cir. 1992), Judge Wisdom who authored the *Robison* test, implicitly acknowledged that *McDermott* did not discard the "permanent or substantial" vessel-connection element of the *Robison* test:

> A seaman has been defined for Jones Act purposes as an ***employee*** (1) who is *permanently assigned to a vessel or who performs a substantial part of his work on the vessel* and (2) whose duties contribute to the function of the vessel or to the accomplishment of its mission. *See*, e.g., *McDermott Int'l. . . .*" (citations omitted, emphasis supplied.)

In *Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1265 (1992), the Fourth Circuit analyzed the impact of *McDermott* on the Jones Act status test. As noted above, the Fourth Circuit *Stephenson* test demands all the essential requirements of the Fifth Circuit *Robison* test. The first prong of the *Stephenson* test requires that the "worker must be more or less permanently attached to a vessel or fleet." The Fourth Circuit in *Harwood* held:

> "In [*McDermott*], the Court stated that "master or member of a crew" should be defined "solely in terms of the employee's connection to a vessel in navigation." Thus, the Court reinforced the importance of the first prong of the *Stephenson* definition. Our holding in this case is consistent with the Court's opinion in *McDermott*. Since *Harwood was not "more or less permanently attached" to the M/V CAPTAIN MOST*, he cannot satisfy the definition of "master or member of a crew" under the LHWCA. (citation omitted; emphasis supplied).

Id. at 1191 n. 2.

Another significant decision involving a maritime pilot is *Ray v. Great Lakes Towing Co.*, No. 3: 92 Civ. 7034 (N.D. Ohio February 25, 1992). The *Ray* court expressed puzzlement that although the District Court in *Evans* (the case at bar) recognized that *Griffith v. Wheeling Pittsburgh* sets out the Jones Act test used in the Third Circuit, the district court's decision in *Evans* runs counter to the jurisprudence.

The *Ray* court noted that the **Sixth Circuit** in *Boyd v. Ford Motor*, 948 F.2d 283 (6th Cir. 1991), accepted that *McDermott* did not impinge on the permanent or substantial vessel-connection analysis of the Jones Act seaman status test used in the 6th Circuit. The *Ray* court concluded that the plaintiff, a river pilot, was not a Jones Act seaman.

Stoller v. Evergreen Int'l (U.S.A.) Corp., C92-0466 FMS (N.D. Cal. Sept. 1, 1992), also denied Jones Act status to a pilot. The pilot *unsuccessfully* argued his connection with shipowner's vessel was "more or less permanent" or alternatively, there was a permanent connection to the *port pilot boats* (water taxis to take him to and from assigned vessels) which would satisfy this requirement. Neither argument worked. On shipowner's summary judgment motion in *Stoller*, the court was satisfied that there was no employment relationship between pilot and shipowner. The *Stoller* court understood "employment-related connection" to the vessel as used in *McDermott*, only to mean an "obligation to forward her enterprise," which is in total accord with our explanation above.

The 5th Circuit in *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1 (5th Cir. 1992) and *Campo v. Electro-Coal Transfer Co.*, 970 F.2d 51 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1262 (1993), *reh'g denied*, __ U.S. __, 113 S. Ct. 1883 (1993) never doubted that vessel-connection was a *sine qua non* in establishing Jones Act seaman status. In *Easley*, the 5th Circuit stated:

> "[J]ust as the worker's performance of non-maritime work does not prohibit seaman status [referring to third element of the above test], his performance of traditional maritime work does not confer seaman status. . . . Easley did not have the "employment-related connection to a vessel in navigation" required by *Wilander*. . . . Irrespective of the traditional maritime nature of Easley's work. . . , the irregularity of his intermittent stints of

> short duration on that vessel eschews the substantial and enduring relationship to the vessel envisioned in *Gizoni*, *Wilander*, and *Lawson*. . . . To understand fully the concept of "employment-related connection to a vessel in navigation," we look to this Circuit's traditional definition of a Jones Act seaman announced decades ago in *Offshore Co. v. Robison*. To be covered as a seaman under the Jones Act, a worker must: (1) be permanently assigned to a vessel in navigation or perform a substantial part of his work on the vessel; and (2) contribute to the mission of the vessel. Easley was not permanently assigned to the No. 6; . . . . Neither did he perform a substantial part of his work on the vessel. Clearly neither *Robison* nor *Wilander* and *Gizoni* envision a "snapshot" test for seaman status, inspecting only the situation as it exists at the instant of injury; a much more enduring relationship is contemplated in the jurisprudence. . . ."

Easley, 965 F.2d at 4.

In *Campo*, 970 F.2d at 52-53, the Fifth Circuit stated:

> "[I]n order to bring a claim under the Jones Act, Campo must show that (1) he was *permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet*; and (2) his work contributed to the mission of the vessel or fleet. Whether the plaintiff relied upon establishing a permanent assignment or substantial work performance, he must show a connection to a vessel or fleet of vessels in order to satisfy the first prong of the *Robison/Barrett* test. *See, Buras v. Commercial Testing and Engineering Company*; *Guidry v. Continental Oil Co.* . . . A fleet is "an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. *Barrett*. Campo has failed to identify a group of vessels to which he was permanently assigned

> or on which he performed a substantial amount of work. . . . This grouping fails as a fleet for two reasons. First, Campo did not establish control of these three groups of vessels. Second, Campo was randomly assigned to vessels that entered the terminal, without regard to ownership, and not all of the vessels were owned or controlled by these three companies. It is well established that a large number of variously owned and controlled vessels does not constitute a fleet. *See, e.g., Langston v. Schlumberger Offshore Servs.*; *Buras*; *Guidry*. Since Campo has not shown a relationship to a fleet of vessels, he does not qualify as a Jones Act seaman." (citations omitted, emphasis supplied).

In *Gibson v. TCB Industries, Inc.*, No. 1993 U.S. Dist. LEXIS 7012, *12 (E.D. La. May 17, 1993), plaintiff claimed that the *McDermott* case prevented the defendant from succeeding on its summary judgment motion. The Court noted:

> The Court in *Wilander* stated that 'the question in this case is whether one must aid in the navigation of a vessel in order to qualify as a 'seaman' under the Jones Act.'(citation omitted) That question only concerns the second prong of *Robison*, which requires that a seaman's duties 'contribute to the function of the vessel or to the accomplishment of its mission.' However, both *Robison* prongs must be satisfied before a plaintiff can prevail on the issue of seaman status in this Circuit.(citation omitted) Nothing in the *Wilander* Court's decision has any impact on the Fifth Circuit cases which address *Robison's* first prong.

Set forth hereunder, in summary fashion, are the holdings in some of the numerous **post**-*McDermott* cases which confirm that *McDermott* did not abolish the essential vessel-connection requirement to prove Jones Act status and there is

absolute consistency among the Circuit Courts and state courts:

Coats v. Penrod Drilling Corp., 5 F.3d 877 (5th Cir. 1993);

Michel v. Total Transp., Inc., 957 F.2d 186 (5th Cir. 1992);

Kathriner v. Unisea, Inc., 975 F.2d 657 (9th Cir. 1992);

Easley v. Southern Shipbuilding Corp., 965 F.2d 1 (5th Cir. 1992);

DiGiovanni v. Traylor Bros., 959 F.2d 1119 (1st Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 87 (1992);

Palmer v. Fayard Moving and Transp., 930 F.2d 437 (5th Cir. 1991);

Taylor v. Cooper River Constructors, 830 F. Supp. 300 (D.S.C. 1993);

Coker v. Best Workover, Inc., No. 92-3123, 1993 U.S. Dist. LEXIS 10668 (E.D. La. July 23, 1993);

Gibson v. TCB Enterprises, Inc. No. 91-3941 (E.D. La. May 17, 1993);

Higginbotham v. Monteiro Contractors, Inc., No. 92-2664, 1993 U.S. Dist. LEXIS 6923 (E.D. La. May 13, 1993);

Newsom v. Continental Grain Company, 820 F. Supp. 1187 (D. Minn. 1993);

Roy v. Bethlehem Steel Corp., No. 1:92-CV-376, 1993 U.S. Dist. LEXIS 1647 (E.D. Tx. Oct. 1, 1993);

Leotis v. City of New York, 818 F. Supp. 63 (S.D.N.Y. 1993);

Pearson v. Offshore Specialty Fabricators, Inc., No. 91-3350, 1992 U.S. Dist. LEXIS 15246 (E.D. La. Oct. 6, 1992);

Pickett v. C&B Fabricators, Inc., No. 92-3470, 1992 WL 233770 (E.D. La. Aug. 29, 1992);

Tuckson v. Bunge Corp., No. 91-2794, 1992 WL 189502 (E.D. La. July 24, 1992);

Barron v. Thunder Bay Offshore, Inc., No. 92-0358, 1992 WL 211704 (E.D. La. Aug. 13, 1992);

Ralleigh v. Gulf Island IV, Inc., No. 91-1305, 1992 U.S. Dist. LEXIS 9547 (E.D. La. June 19, 1992);

Olene v. Otto Candies, No. A90-213 Civil, 1992 WL 80812 (D. Alaska 1992);

Bolden v. Offshore Express, 1992 A.M.C. 2043, 2046 (E.D. La. 1992);

Navarro v. Eckstein Marine Servs., No. 91-1056, 1992 U.S. Dist. LEXIS 177 (E.D. La. Jan. 2, 1992);

Davis v. Odeco, No. 91-1694, 1992 U.S. Dist. LEXIS 5399 (E.D. La. Apr. 13, 1992);

Echols v. Elf Aquitane Exploration, Inc., 1992 A.M.C. 2760 (S.D. Tx. 1992);

Johnnie v. Nana Development Corp., 780 F. Supp. 669 (D. Alaska 1991);

Bozeman v. Ensco Drilling Co., No. H-91-734, 1991 WL 216911 (S.D. Tx. Aug. 27, 1991)

Menard v. Brownie Drilling Co., No. 90-2559, 1991 WL 111028 (E.D. La. 1991);

Haynie v. Dynamic Offshore Contractors, No. 89-4552, 1991 WL 87949 (E.D. La. 1991);

Ashley v. Epic Divers, 818 F. Supp. 172 (E.D. La. 1991), *aff'd mem.*, 976 F.2d 730 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct 1415 (1993);

Maze v. "Aleutian Key", 1992 A.M.C. 1539 (E.D. La. 1991), *aff'd mem. sub nom., Maze v. Key*, 974 F.2d 172 (5th Cir. 1992);

Dean v. McKie, 771 F. Supp. 466 (D. Mass. 1991);

Trahan v. Thenamaris Ship Management, Inc., 614 So. 2d 362 (La. Ct. App. 3d Cir. 1993);

Theriot v. McDermott, Inc., 611 So. 2d 129 (La. Ct. App. 1st Cir. 1992), *cert. denied*, 615 So. 2d 342 (La. 1993);

Texaco, Inc. v. Addison, 613 So. 2d 1193 (Miss. 1993);

Machado v. George R. Brown Partnership, John Marceaux, & McMahan Construction, Inc., No. C14-92-00933-CV, 1993 Tex. App. LEXIS 1855 (Tex. Ct. App. July 1, 1993).

It is submitted, that there is no confusion in either the Circuit or State Courts concerning the Jones Act status of a pilot and that the *McDermott* decision did not leave any gaps or create any confusion in the law as to the status of a pilot.

III. PILOTS DO NOT HAVE TO BE CLASSIFIED AS JONES ACT SEAMEN OR LONGSHORE/HARBOR WORKERS; THEY MAY BE CLASSIFIED AS SEAMEN UNDER THE GENERAL MARITIME LAW

Petitioner has misled this Court with his third Question Presented by implying that the cases hold that pilots must be classified as either Jones Act seamen or longshore/harbor workers in order to receive protection under the law. Maritime workers not entitled to bring a claim either under the Jones Act or the Longshore and Harbor Workers Compensation Act are able to bring an action under the general maritime law. This action may include general negligence and unseaworthiness. In *Mahramas v. Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973), the Second Circuit considered the appeal of a plaintiff-employee who was injured aboard a ship

but was not employed by the shipowner and was not covered by the Longshore and Harbor Worker's Compensation Act. The Second Circuit stated that "[A]t the outset, it should be noted that there is no question raised concerning the propriety of the plaintiff's actions against the shipowner for unseaworthiness and general negligence. The duty to provide a seaworthy ship extends not only to the owner's employees but to all 'who perform the ship's service . . . with his consent or by his arrangement.' *Seas Shipping Co. v. Sieracki*, 238 U.S. 85 (1946)" *Mahramas*, 475 F.2d at 169. *See McMahon, Jr. v. M/V TOMIS SEA, Hong Fat Shipping & Yick Fung Shipping & Enterprise Company*, No. 92-2368 C/W 9-3314, 1993 U.S. Dist. LEXIS 7894 (E.D. La. May 28, 1993) ("The Fifth Circuit has not foreclosed the right of some claimants who are not Jones Act seamen, and who are not covered by the LHWCA, to maintain a claim for unseaworthiness against a vessel owner. . . ." (citation omitted)). Outside the ambit of the Jones Act, the general maritime law still applies. *McAleer v. Smith*, 818 F. Supp. 486 (D.R.I. 1993).

Maritime workers do not have to be classified as either Jones Act seamen or longshore/harbor workers entitled to protection under the LHWCA unless they meet the requirements to be classified as such; they may sue as seamen under the general maritime law.

CONCLUSION

The decision of the Third Circuit is consistent with all other United States Courts of Appeals' requirements for bringing a Jones Act claim. Furthermore, the Third Circuit's decision is in accord with this Court's decision in *McDermott v. Wilander*, 498 U.S. 337 (1991). For the reasons discussed above, respondent, United Arab Shipping Company S.A.G., respectfully submits that this Court should deny petitioner's petition for a writ of certiorari.

Respectfully submitted,

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